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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

AMOCO PRODUCTION COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
1. The 1965 Certificate	3
2. The 1967 Certificate	4
3. The Transportation Agreements	6
4. The May 2, 1977 Order	8
5. The July 27, 1977 Order	8
6. The Court of Appeals Decision	9
REASONS FOR GRANTING THE WRIT	10
I. The Court of Appeals' Decision Is In Conflict with Decisions of This Court As To Finality To Be Accorded Certificates Issued By Federal Administrative Agencies	10
II. The Questions of Finality To Be Accorded Terms and Conditions of Certificates Are of General Importance In the Administration of The Natural Gas Act	14
III. The Holding Below Is In Conflict With Decisions of the Courts of Appeals As To Binding Effect of Settlements Approved By The Commission..	16
CONCLUSION	18

TABLE TO APPENDICES

	Page
APPENDIX A:	
United States Court of Appeals Opinion issued July 5, 1979	1a
APPENDIX B:	
United States Court of Appeals Judgment issued July 5, 1979	26a
APPENDIX C:	
Federal Power Commission Order Granting And Conditioning Certificates of Public Convenience and Necessity issued May 2, 1977	28a
APPENDIX D:	
Federal Power Commission Order Denying Rehearing issued July 27, 1977	44a
APPENDIX E:	
Sections 7(b), 7(c) and 7(e) of the Natural Gas Act	50a

TABLE OF AUTHORITIES

CASES: Page

Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U.S. 378 (1959) 11

Brennan v. *Occupational Safety and Health Commission*, 502 F.2d 30 (5th Cir. 1974) 11

Civil Aeronautics Board v. *Delta Airlines, Inc.*, 367 U.S. 316 (1961) 11

Continental Oil Company v. *Federal Power Commission*, 373 F.2d 96 (10th Cir. 1967) 16

Garrett Freightlines, Inc. v. *United States*, 324 F. Supp. 575 (D. Idaho 1971) 11

Tennessee Gas Pipeline Company v. *Federal Power Commission*, 504 F.2d 199 (D.C. Cir. 1974) 16

Texas Eastern Transmission Corporation v. *Federal Power Commission*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963) 16

United States v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947) 9, 11, 12, 13, 15, 16

ADMINISTRATIVE DECISIONS AND ORDERS:

Coastal Transmission Corp., et al., 26 FPC 677 (1961) 12

Certification of the Use of Natural Gas To Displace Fuel Oil, ERA Docket No. ERA-R-79-16, 44 Fed. Reg. 47920 (1979) (to be codified in 10 C.F.R. Part 595) 13

Transcontinental Gas Pipe Line Corporation, et al., FERC Docket Nos. CP79-214, *et al.*, Order Granting Certificates of Public Convenience and Necessity (August 13, 1979) 13

Transcontinental Gas Pipe Line Corporation, FERC Docket No. CP79-228, Order Granting Certificate of Public Convenience and Necessity (August 13, 1979) 13

Transportation Certificates For Natural Gas For the Displacement of Fuel Oil, FERC Docket No. RM79-34, 44 Fed. Reg. 30323 (1979) (to be codified in 18 C.F.R. Part 284, Subpart F) 13

TABLE OF AUTHORITIES—Continued

STATUTES:	Page
Interstate Commerce Act, 24 Stat. 379 (1887), 54 Stat. 929 (1940) 49 U.S.C. § 909(d)	11
Natural Gas Act, 52 Stat. 821 (1938), 15 U.S.C. § 717, *et seq.*:	
Section 7, 15 U.S.C. § 717f	3, 5, 11
Section 7(b), 15 U.S.C. § 717f(b)	2
Section 7(c), 15 U.S.C. § 717f(c)	2
Section 7(e), 15 U.S.C. § 717f(e)	2, 10, 11
Section 19, 15 U.S.C. § 717r	2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Amoco Production Company petitions for a writ of certiorari to review the judgment of United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 1a-25a) is reported at 598 F.2d 370. The order of the Federal Power Commission [1] (Appendix C,

[1] Under the provisions of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 42 U.S.C. §§ 7101, *et seq.*, the Federal Power Commission ceased to exist on September 30, 1977, and most of its functions, including those relevant to this case, were assumed by the Federal Energy Regulatory Commission on October 1, 1977. References in this petition to the "Commission" are to the FPC or the FERC depending on whether the event occurred before or after October 1, 1977.

infra, pp. 28a-43a) is not yet reported, and its order denying rehearing (Appendix D, *infra*, pp. 44a-49a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, pp. 26a-27a) was entered on July 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission (now the Federal Energy Regulatory Commission) has authority under Section 7 of the Natural Gas Act to impose new conditions prohibiting a use of natural gas when such new conditions add to and conflict with the conditions imposed in a final order issued by the Commission ten years earlier approving a settlement and issuing a certificate expressly allowing the use of gas the new conditions would prohibit.

2. Whether the Federal Power Commission (now the Federal Energy Regulatory Commission) has authority under Section 7 of the Natural Gas Act to impose new conditions requiring Commission authorization for disconnection of natural gas fields when such new conditions contradict the provisions of a final certificate issued years earlier permitting such disconnection of natural gas fields without prior Commission authorization.

STATUTES INVOLVED

Sections 7(b), 7(c), and 7(e) of the Natural Gas Act, 15 U.S.C. §§ 717f(b), 717f(c), and 717f(e), are set forth in Appendix E, *infra*, pp. 50a-52a.

STATEMENT

This case involves two natural gas sales contracts of Amoco, final certificates of public convenience and necessity issued under Section 7 of the Natural Gas Act in 1965 and 1967, and orders issuing additional certificates in 1977 containing the "conditions" contested in this case:

1. *The 1965 Certificate.* Under a contract dated November 20, 1964, Amoco[2] agreed to sell natural gas produced in Louisiana to Florida Gas Transmission Company (FGT), an interstate pipeline purchasing gas in Texas and Louisiana and reselling the gas to direct and resale customers in the state of Florida (R. 425-474).

Unlike conventional sales contracts in the industry, this contract does not contain a commitment or dedication of specific leases or fields to performance of the contract (R. 672). Instead, the contract provides for sale to FGT of a specific quantity of gas (584,400,000 MCF[3]) without reference to source, and Amoco undertakes a "warranty" that the specified quantity will be delivered (R. 433-436, 457-459, 672).

Amoco's sale to FGT is a sale in interstate commerce for resale and thus subject to Commission jurisdiction under the Natural Gas Act. Accordingly, in 1964, Amoco filed an application for a certificate under Section 7 of the Act authorizing the sale to FGT in accordance with the contract (R. 669-729). The application was supplemented to show that a substantial part of initial deliveries would be from the onshore North Fresh Water Bayou Field, La., and the offshore Block 14 Field Vermilion Parish, La.

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[2] At that time and until 1970, the name of Amoco Production Company was Pan American Petroleum Corporation.

[3] An MCF is a thousand cubic feet and a standard unit of measurement of natural gas.

(R. 1128). It was recognized that other fields would have to be added in subsequent years.

On September 15, 1965, the Commission issued an order in its Docket No. CI65-584 granting Amoco a certificate (R. 1128-1133). In that order, the Commission provided ". . . that existing as well as yet undiscovered fields may be attached to a pipeline and abandoned without regulatory action in future years" (R. 1130). Such provision was implemented with conditions requiring that:

(1) When Amoco commences deliveries from any field, Amoco is required to file a letter notifying the Commission of the identity of the field and of parties whose share of gas produced therefrom is to be delivered to FGT and copies of instruments of contract ratification by such parties;

(2) When Amoco terminates delivers from any field, Amoco is required to file a notification of the cessation and identity of producers involved; and

(3) All deliveries must be from fields or reservoirs located in the south Louisiana area, as defined in the Commission's Statement of General Policy No. 61-1 as amended, with no more than 50% of the gas in any contract year originating from areas outside the tax jurisdiction of Louisiana, *i.e.*, from offshore sources. (R. 1132-1133).

The certificate order became final on October 16, 1965, and Amoco commenced deliveries to FGT in 1966.

2. *The 1967 Certificate.* Under a contract dated March 12, 1965, Amoco agreed to sell natural gas to Florida Power & Light Company (FP&L), an electric generating and distribution company operating in Florida (R. 524-564, 1758). Plagued by air pollution problems, FP&L sought natural gas for generation of electricity

in existing and new plants (R. 1168-1169). FGT agreed to transport FP&L's gas from the point of delivery by Amoco in Louisiana to FP&L's generating plants in Florida (R. 1148).

The Amoco-FP&L contract also is a "warranty-type" contract containing no commitment or dedication of specific leases or fields (R. 1148). Amoco agreed to deliver to FP&L 100,000 MMBTU per day for 1967 and 200,000 MMBTU per day in 1968 and subsequent years for twenty years, or delivery of a total of 1,425,500,000 MMBTU, whichever occurred first (R. 533-535, 540, 1148). Subsequently, under a Commission-approved settlement discussed *infra*, the contract was amended to provide that after 15 years from date of initial deliveries, the "warranty" would be deleted, and Amoco's only obligation would be to deliver to FP&L production from those wells connected to FGT's system from which gas had been delivered to FP&L (R. 415-416).

Amoco's sale to FP&L is a direct sale not subject to Commission jurisdiction. However, FGT's transportation service for FP&L required Commission authorization under Section 7 of the Natural Gas Act, and on June 9, 1965, FGT filed in Docket No. CP65-393, an application for a certificate authorizing construction and operation of additional facilities and transportation of FP&L's gas (R. 730-1127).

After hearing, the Commission on March 1, 1967, issued an opinion and order granting a certificate to FGT (R. 1140-1200). Two conditions now relevant were attached: (1) all gas sold to FP&L must come from the southern Louisiana area, Mississippi, and other downstream states, and no more than 85% of the gas could be produced from fields *offshore* Louisiana (R. 1171); and (2) FGT was required to file an annual statement as to volumes delivered to FP&L by field and reservoir

and names of fields and reservoirs from which deliveries were being made (R. 1173).

A late intervention and an application for rehearing were filed by the Public Service Commission of the State of New York. This led to further procedures and conferences culminating in a stipulation and agreement to resolve issues raised by New York, and on May 12, 1967, FGT filed this settlement and a motion for Commission approval and issuance of a certificate in accordance with the settlement (R. 1201).

On May 29, 1967, the Commission issued an order approving the settlement (R. 1201-1203). In accordance with the settlement, the Commission amended the conditions in its March 1, 1967 opinion and order to provide that all gas sold to FP&L shall be produced from the southern Louisiana area, Mississippi, and other downstream states; that from initial deliveries through ten years from that date, the proportion delivered from *offshore* Louisiana fields shall not exceed 82% of the total amount of gas produced from the southern Louisiana area, with takes balanced over this ten-year period; and that the ratio of offshore-onshore deliveries must be reported annually to the Commission (R. 1202). Under this condition, up to 82% of the gas sold to FP&L for the first ten years thus could come from offshore fields, and after ten years, all gas sold to FP&L could come from offshore sources.

The Commission's May 29, 1967 order became final on June 29, 1967, and deliveries by Amoco to FP&L, commenced in June, 1968 (R. 1780).

3. *The Transportation Agreements.* In the 1970s, Amoco continued its program of exploration and development of leases in new fields, both in onshore and offshore Louisiana, for additional sources of gas for deliveries under the FGT and FP&L contracts. As part of this program, Amoco entered into agreements with four interstate pipelines for exchanges and transportation of

Amoco's gas from fields of production to points of delivery on FGT's system in southern Louisiana (R. 1748-1750). Gas so transported and delivered was intended to meet Amoco's delivery obligations under both the FGT and FP&L contracts.

These exchange and transportation arrangements required Commission authorization under Section 7 of the Natural Gas Act. Accordingly, Amoco and the four pipelines filed applications for issuance of certificates in accordance with their agreements.[4] By orders issued in 1976, the Commission consolidated the six applications involved for formal hearings (R. 1448-1455, 1594, 1599).

Hearings were held before an Administrative Law Judge on November 16 and 17 and December 7, 1976 (R. 1-291). Amoco and the four pipeline applicants submitted extensive evidence in support of the applications.

No evidence adverse to the applicants was presented; the intermediate decision by the ALJ was waived; the record was certified to the Commission; and the case was submitted on briefs by the parties (R. 1608). In briefs, the Commission Staff proposed issuance of the certificates with a condition prohibiting deliveries by Amoco of any volumes produced from offshore fields in satisfaction of Amoco's contract with FP&L (R. 1623). No party or the Staff proposed a condition requiring Amoco to seek Commission authorization before ceasing deliveries from a particular field.

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[4] These applications were by Columbia Gulf Transmission Company in Docket No. CP73-70 covering transportation from both onshore and offshore sources, by Natural Gas Pipeline Company of America in Docket No. CP73-157 covering transportation from an onshore field, by Sea Robin Pipeline Company in Docket No. CP77-37 covering transportation from an offshore field, by Columbia Gulf and Tennessee Gas Pipeline Company in Docket No. CP77-31 covering transportation from an offshore field, and by Amoco in Docket Nos. CI77-80 and CI77-81 covering exchanges with Columbia and Natural (R. 1261-1315, 1560-1592, 1489-1559, 1456-1479, 1480-1488).

4. *The May 2, 1977 Order.* The Commission on May 2, 1977, issued its order granting certificates as sought by the appellants, but with the new restrictive conditions opposed by Amoco (Appendix C, *infra*, pp. 28a-43a). The Commission adopted the Staff's proposal and provided in its ordering paragraph (H) that gas produced from offshore Federal domain sources "shall be delivered only in satisfaction of the Amoco-FGT warranty sale, and none of such gas shall be transported to FPL" (R. 1757). The Commission stated that in a period of natural gas shortage ". . . the granting of a certificate at this time to provide additional gas supply for boiler use . . . would not be in the public interest" (R. 1753).

The Commission *sua sponte* imposed in ordering paragraph (D) the condition requiring Amoco to apply for Commission authorization before disconnecting sources of supply used in performance of the FGT and FP&L contracts (R. 1756-1757).

5. *The July 27, 1977 order.* Amoco and FP&L applied for rehearing as to those new restrictive conditions. Amoco argued that the May 2, 1977 order unlawfully modifies the May 29, 1967 certificate order issued in Docket No. CP65-393 as to permissible sources of supply for the FP&L contract (R. 1768-1770); that the May 2, 1977 order unlawfully modifies the 1965 and 1967 certificate orders in Docket Nos. CI65-584 and CP65-393 as to disconnection of gas fields (R. 1771-1772); and that the new condition restricting use of offshore gas would prejudice Amoco's continued performance of its obligations under the FP&L contract (R. 1772-1773). FP&L argued that the condition prohibiting use of offshore sources was in conflict with the 1967 certificate authorizing transportation to FP&L (R. 1760), and that the May 2, 1977 order unlawfully discriminates against FP&L by allowing FGT's customers use of those offshore sources for boiler fuel while denying the same use by FP&L (R. 1753).

By order issued July 27, 1977, the Commission denied rehearing (Appendix D, *infra*, pp. 44a-49a). Briefly considering the arguments of Amoco and FP&L, the Commission stated that nothing in the 1967 order prevented imposition of new conditions as to new sources of supply (R. 1780); and that it was not in the public interest to permit offshore gas to be used by FP&L for boiler fuel use, the lowest priority of uses under current Commission curtailment policies (R. 1781-1782). The Commission did not address the issue of modification of the 1965 and 1967 certificates by the new condition as to disconnecting fields or the issue of prejudice to Amoco's continued performance of its obligations under the FP&L contract.

6. *The Court of Appeals Decision.* On review, the court of appeals affirmed the Commission as to validity of the conditions imposed by the May 2, 1977 order (Appendix A, *infra*, pp. 1a-27a).

The court of appeals held as a "technical matter" that the Commission did not amend or modify the 1965 and 1967 certificates and acted "within its authority" in imposing new restrictive conditions (Appendix A, *infra*, p. 7a). The court recognized that under the doctrine of *United States* v. *Seatrain Lines Inc.*, 329 U.S. 424 (1947), the Commission may not modify a final certificate, and that under cases such as *Texas Eastern Transmission Corp.* v. *FPC*, 306 F. 2d 345 (5th Cir. 1962), *cert. den.* 375 U.S. 941 (1963), the Commission may not modify a settlement agreement approved by it (Appendix A, *infra*, p. 11a). However, under the court's analysis, the 1965 and 1967 certificates were not "tantamount to a decision" on public convenience and necessity of every subsequent purchase or transportation desired by Amoco to perform its contracts under the conditions previously imposed (Appendix A, *infra*, p. 17a); *Seatrain* and similar cases thus were not considered appli-

cable; the conditions attached to the new certificates involved new sources of gas and were based on the "strain of the gas shortage" and the standards of Section 7(e) of the Act; and the "new certificates did not modify the old" (Appendix A, *infra*, p. 19a)

The court recognized that the new conditions "undoubtedly" affect the manner in which Amoco thereafter could meet its obligations under the contracts, and that the 1965 and 1967 certificates "may" have contemplated that additional fields "might" be attached to FGT "to satisfy the warranty contracts" (Appendix A, *infra*, p. 19a). Nevertheless, the court concluded that the Commission was not bound by its earlier orders and not foreclosed from taking into account the gas shortage at the time of issuance of the new certificates 10 years later and current standards of public convenience and necessity (Appendix A, *infra*, p. 20a). The court further concluded that the Commission's prior actions did not otherwise prevent imposition of the new restrictive conditions (Appendix A, *infra*, pp. 20a-22a), and that the conditions were reasonable, were based on permissible policy grounds, and were not arbitrary and capricious (Appendix A, *infra*, pp. 22a-25a).

The court of appeals did not discuss the issue of validity of the new condition requiring Amoco to seek Commission authorization prior to disconnection of fields supplying the FGT and FP&L contracts.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Is In Conflict with Decisions of This Court As To Finality To Be Accorded Certificates Issued By Federal Administrative Agencies

The court of appeals and the Commission have failed to follow and apply the established principles that a federal administrative agency cannot alter or otherwise

modify the terms and conditions of a certificate or license after the certificate or license has become final and the holder has acted in reliance upon its terms and conditions.

This doctrine was established by this Court in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947). In *Seatrain*, the Court held that the Interstate Commerce Commission could not so modify a final certificate issued under Part III of the Interstate Commerce Act. The ICC had argued that it was empowered to modify final certificates by Section 309(d) of Part III of the Interstate Commerce Act which authorizes attachment of "conditions" to certificates. This Court rejected the argument finding no such authority for alteration of certificates from power to fix terms and conditions and holding:

> "The certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress" (329 U.S. at 432-433).

The principles stated in *Seatrain* have been held applicable to other agencies. See *Civil Aeronautics Board* v. *Delta Airlines, Inc.*, 367 U.S. 316 (1961); *Brennan* v. *Occupational Safety and Health Commission*, 502 F.2d 30 (5th Cir. 1974); *Garrett Freightlines, Inc.* v. *United States*, 324 F. Supp. 575 (D. Idaho 1971).

Section 7 of the Natural Gas Act is, in pertinent part, substantially the same as Section 309(d) of Part III of the Interstate Commerce Act, and Section 7(e) authorizes the Commission to attach conditions to a certificate at the time of issuance. *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 388-389 (1959). Thereafter, upon expiration of the times allowed for rehearing and judicial review under Section 19 of the Act, the certificate becomes final. No provision of the Act grants the Commission power there-

after to alter, modify, or amend a final certificate, and the Commission in the past acknowledged that it does not have power to rescind effective, final certificates. *Coastal Transmission Corp., et al.*, 29 FPC 677, 680 (1961).

The effort in this case to avoid applicability of the *Seatrain* doctrine is specious. The "technical" distinction found by the court of appeals thus is groundless and not in accord with reality. The 1967 certificate authorizing transportation of FP&L's gas permitted up to 82% of the natural gas supply to come from offshore sources for ten years, and after June 9, 1978, permitted up to 100% to come from offshore sources. The 1977 certificates did not involve new sales, new markets, or quantities in excess of the volumes authorized in 1967. The 1977 ceritficate involved only the use of available capacity in existing pipelines for limited transportation from fields of production to FGT's system of volumes already authorized for sale and delivery to FP&L under the 1967 certificate. No new sale or "service" was involved, but the conditions imposed in 1977 directly block and prohibit deliveries of natural gas and use of offshore sources expressly contemplated and authorized by the 1967 certificate. The reality thus is that in 1977 the Commission acted to alter and modify conduct expressly made permissible under the 1967 certificate in a manner in conflict with the *Seatrain* doctrine.

Seatrain and similar cases emphasize the practical importance of certificate finality in regulated industries. Long-term performance of contract and certificate obligations is required. Planning, financing, and commitment of capital are based upon the terms and conditions of certificates issued by agencies such as the Commission. In this instance, the certificates issued in 1965 and 1967 apply to performance by Amoco over a period of twenty years, and Amoco properly planned its drilling program

in reliance upon the certificate provisions expressly permitting the use of offshore fields to supply both the FGT and FP&L contracts. Yet, in contrast to the principles set out in *Seatrain*, the 1977 orders bar the use of these sources and prohibit performance contemplated by the certificate issued in 1967.

Change of agency policy also is not a valid ground for alteration or modification of final certificates. The question was canvassed in *Seatrain*, and the Court stated:

> ". . . the proceedings apparently were not reopened to correct a mere clerical error but were more likely an effort to revoke or modify substantially Seatrain's original certificate under the new policy announced in the Foss case . . . ." (329 U.S. at 429).

Change of policy thus may be properly applicable to new sales and new "service" but does not justify deliberate impairment of provisions of and performance under a final certificate.[5]

The principle at issue in this case is of importance for all regulated industries, particularly for the industry subject to Commission jurisdiction under the Natural

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[5] Significantly, the applicable federal policy as to boiler fuel and use of natural gas for electric generation has changed since issuance of the Commission's orders in 1977. In 1979, the Department of Energy and the Commission have issued policy statements and rules encouraging and authorizing such use by industry and utilities, including switching from use of oil to use of natural gas under boilers. See *Transportation Certificates For Natural Gas For the Displacement of Fuel Oil*, FERC Docket No. RM79-34, 44 Fed. Reg. 30323 (1979) (to be codified in 18 C.F.R. Part 284, Subpart F); *Certification of the Use of Natural Gas To Displace Fuel Oil*, ERA Docket No. ERA-R-79-16, 44 Fed. Reg. 47920 (1979) (to be codified in 10 C.F.R. Part 595); *Transcontinental Gas Pipe Line Corporation*, FERC Docket No. CP79-228, Order Granting Certificate of Public Convenience and Necessity (August 13, 1979); and *Transcontinental Gas Pipe Line Corporation, et al.*, FERC Docket Nos. CP79-214, *et al.*, Order Granting Certificates of Public Convenience and Necessity (August 13, 1979).

Gas Act.[6] Proper recognition of and adherence to principles of administrative law and doctrines controlling agency action enunciated by this Court also are involved. The decision below is in conflict with those principles and doctrines, and review by this Court thus is of importance and fully warranted.

II. The Questions of Finality To Be Accorded Terms and Conditions of Certificates Are of General Importance In the Administration of The Natural Gas Act

The system of regulation under the Natural Gas Act rests upon certificates issued under Section 7 authorizing transactions which are performed over a long term of years. Agreements of producers and pipelines for sales of natural gas contemplate deliveries over a long period, such as twenty years, and the certificate issued under Section 7 establishes the terms and conditions controlling performance over such an extensive term.

Since 1938, the Commission has issued hundreds of certificates to pipelines, and since 1954, thousands of certificates to producers. Once such certificates become final, they become the basis for corporate financing, commitment of capital, and planning of operations. In reliance upon the finality of the terms and conditions in a certificate, producers thus plan exploration and development programs in contemplation of their long-term obligations and the acts authorized and permitted by the certificate.

The gist of the court of appeals decision is that the Commission may disregard the terms and conditions of a final certificate and a producer's reliance thereon and enter orders having the direct effect of limiting, proscribing, and modifying the course of conduct and method of performance authorized many years earlier by the Commission in issuance of a certificate under Section 7. Such action by the Commission destroys the stability contemplated by a system of regulation based upon finality of certificates and legitimate reliance upon such finality by regulated entities. The result is havoc with planned operations and impairment of the ability of a regulated company to perform its obligations under long-term sales agreements.

[6] The questions of finality and failure to apply and follow *Seatrain* are applicable to the new condition requiring Commission authorization for disconnecting fields as well as to the new condition prohibiting use of offshore sources to supply the FP&L contract.

Amoco's predicament in performance of the FP&L contract is illustrative. Amoco properly relied upon the provisions of the 1967 certificate permitting up to 82% of gas delivered to FP&L to come from offshore sources for ten years and permitting up to 100% to come from offshore sources after 1978. In reliance upon the 1967 certificate, Amoco emphasized the offshore area in exploration for new gas supplies, acquisition of leases, and development of producing properties. As a result, Amoco has proven supplies from offshore sources available for performance of the FP&L contract. However, the new "conditions" would prohibit use of these sources and force Amoco to seek to supply FP&L from onshore sources; the added burden upon Amoco would be to somehow come up with substantial proven onshore reserves. Because of the long lead times required in exploration and development, it simply is not possible for Amoco to plan exploratory and development operations subject to sudden contraction of the permissible supply area.

Reasonable regulation does not permit such sudden, unilateral and drastic changes by a regulatory body in the effect of its orders governing the performance of contractual obligations. The result would be inconsistent with responsible administration of the Natural Gas Act. The principle of finality expressed in *Seatrain* and similar cases correctly and properly precludes such deliberate

change of the parameters of performance permissible under Commission orders, particularly when there has been proper reliance upon express terms and conditions of a certificate that has been outstanding and final for ten years.

The holding below is an erosion of stability and finality required under Section 7 of the Natural Gas Act. The holding is not limited in its applicability to this case and may be made applicable to any of the thousands of outstanding certificates issued under Section 7. What occurred in this case can occur at any time the Commission decides to change its mind and enter orders in conflict with allowable actions under an outstanding certificate. The questions presented thus are of general applicability and importance in the administration of Section 7 of the Natural Gas Act and warrant review by this Court.

III. The Holding Below Is In Conflict With Decisions of the Courts of Appeals As To Binding Effect of Settlements Approved By The Commission

The courts of appeals have held that settlements, which are encouraged for disposition of contested cases under the Natural Gas Act, are binding upon the Commission once the Commission has reviewed and approved the settlement agreement. *Texas Eastern Transmission Corporation* v. *Federal Power Commission*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963); *Continental Oil Company* v. *Federal Power Commission*, 373 F.2d 96 (10th Cir. 1967); *Tennessee Gas Pipeline Company* v. *Federal Power Commission*, 504 F.2d 199 (D.C. Cir. 1974). The decision in this case is in conflict with these holdings.

In 1967, the settlement submitted to the Commission included the express condition that for the first ten years of deliveries to FP&L, up to 82% of the volume could

come from offshore sources, and included no restriction on sources of gas after expiration of that ten years in 1978 (R. 366). The Commission formally approved this settlement, expressly providing in its May 29, 1967 order that no more than 82% of the gas delivered to FP&L for ten years could be produced from offshore fields and with no restriction as to source after the first ten years (R. 1202). Neither the agreement nor the order is susceptible to an interpretation that the Commission subsequently is free, unilaterally, to delete one of the terms of the settlement and add a new, more restrictive term.

The court of appeals recognized the genesis of the offshore percentage in a settlement, and that the Commission had formally approved the settlement agreement (Appendix A, *infra*, p. 12a). However, the court ignored the binding effect of the agreement on the Commission which precluded subsequent Commission action in conflict with and modifying the operations and course of performance contemplated by the settlement. Had the court applied the principles set out in the cases cited *supra*, the court necessarily would have concluded that the Commission remained bound by the settlement it had approved and was not free in 1977 to enter orders denigrating that agreement and prohibiting deliveries from sources in accordance with the settlement. This is true even if the attempt to modify a previously approved settlement is made in a subsequent collateral proceeding.

Under the prior holdings of the Fifth, Tenth and District of Columbia Circuits cited *supra*, the 1967 agreement would have been binding upon the Commission, barring imposition of the new "conditions" in the 1977 orders. The court of appeals, however, failed to follow the precedent of those cases, with the result that its holding is in conflict with the holdings in those cases.

Settlements are a major element in disposition of contested matters under the Natural Gas Act. The settle-

ment process is dependent upon consistent treatment of settlements as binding upon the parties *and* the Commission, once the Commission has approved the settlement agreement. The holding in this case permits unilateral vitiation of a settlement by the Commission, threatens viability of the settlement process, and cannot be reconciled with the prior holdings of the Fifth, Tenth, and District of Columbia Circuits as to limitations on the Commission. This conflict should be reviewed and resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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September 26, 1979

Appendices

APPENDIX A

No. 77-2869

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

FLORIDA POWER & LIGHT COMPANY and
AMOCO PRODUCTION COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

July 5, 1979

Gas company and power company petitioned for review of order of the Federal Energy Regulatory Commission conditioning certificate of public convenience and necessity for transportation of gas to prohibit gas company from using gas from offshore wells to fulfill commitment to supply boiler fuel to power company. The Court of Appeals, Roney, Circuit Judge, held that: (1) new certificate including restriction on use of gas from offshore wells did not modify prior certificates issued by Commission approving warranty contract between gas company and power company and pipeline company; (2) in absence of indication that gas company would not be able to meet its contractual commitments, imposition of condition on use of gas from offshore wells was not unreasonable as being inconsistent with prior decision approving warranty contracts under which gas company was required to supply gas; (3) imposition of condition on certificate was reasonable accommodation between conflicting contractual interests and public regulations; (4) having found that it was against public interest for

natural gas to be used for boiler fuel during times of shortage when higher priority needs could not be filled, it was not unreasonable or arbitrary to attach condition on transportation certificate to prohibit boiler use, and (5) in absence of evidence that power company's contractual needs would not be fulfilled, Commission order did not discriminate unfairly against power company and favor customers of pipeline company who also used gas as boiler fuel.

Affirmed.

1. Gas § 1

Gas company's sale of gas to power and light company was not sale for resale subject to jurisdiction of Federal Energy Regulatory Commission; however, any interstate transportation of such gas was within jurisdiction of Commission.

2. Gas § 2

Where pursuant to warranty contract gas transmission company agreed to transport gas sold by the gas company to power company from Louisiana to power company's generating facilities in Florida, such transportation service was subject to sections of Natural Gas Act.

3. Gas § 1

Purchases by interstate gas pipeline company of gas in the field for resale involved sale in interstate commerce for resale subject to jurisdiction of Federal Energy Regulatory Commission. Natural Gas Act, § 1(b), 15 U.S.C.A., § 717(b).

4. Gas § 6

Initial certificates by Federal Energy Regulatory Commission approving warranty contracts by which gas company agreed to supply gas to power company and pipeline company were not tantamount to decision of public convenience and necessity of every subsequent purchase or transportation which might in future be desired by gas company to comply with such contracts.

5. Gas § 6

Although prior certificates approving warranty contracts by which gas company agreed to supply gas to power company and pipeline company could have contemplated that additional fields might be attached to pipeline to satisfy warranty contracts, Federal Energy Regulatory Commission did not, and could not, cast off its statutory obligation to judge future applications in light of public interest at time of consideration.

6. Gas § 6

Certificates of public convenience and necessity issued by Federal Energy Regulatory Commission to gas company approving transportation of gas from offshore wells to onshore terminals did not modify prior certificates issued by Commission approving warranty contracts by which gas company agreed to supply gas to power company and pipeline company, notwithstanding that new certificate prohibited gas company from using gas from offshore wells to satisfy boiler fuel contract with power company.

7. Gas § 6

Federal Energy Regulatory Commission is not required to blindly approve applications for certificates of public convenience and necessity which may be sought in connection with performance of long-term contracts; Commission is required to approve each such application taking into account current standards of public convenience

and necessity. Natural Gas Act, § 7(e), 15 U.S.C.A. § 717f(e).

8. Gas § 13(3)

Cost alone could not be determining factor in review of policy determinations by Federal Energy Regulatory Commission during natural gas shortage.

9. Gas § 6

In absence of indication that gas company would not be able to meet its contract commitments, condition placed on certificate of public convenience and necessity prohibiting use of gas from offshore wells to fulfill commitment under contract to provide boiler fuel to power company was not unreasonable as being inconsistent with prior decision of Federal Energy Regulatory Commission approving contract between gas company and power company.

10. Gas § 2

Overall purpose of Natural Gas Act is to protect interests of consumers in adequate supply of gas and at reasonable rates. Natural Gas Act, § 1 et seq., 15 U.S.C.A. § 717 et seq.

11. Gas § 6

Imposition by Federal Energy Regulatory Commission of condition on certificate of public convenience and necessity prohibiting use by gas company of gas from offshore wells to fulfill commitment under contract to provide boiler fuel to power company was reasonable accommodation between conflicting contractual interests of gas company and public regulation of gas. Natural Gas Act, § 7(e), 15 U.S.C.A. § 717f(e).

12. Gas § 6

Where policies of Federal Energy Regulatory Commission were under attack, its action imposing condition on certificate of public convenience and necessity prohibiting gas company from using gas from offshore wells to fulfill commitment under contract to provide boiler fuel to power company could be set aside only if found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

13. Gas § 6

Federal Energy Regulatory Commission has authority to impose conditions on certificates of public convenience and necessity. Natural Gas Act, § 7(e), 15 U.S.C.A. § 717f(e).

14. Gas § 6

Where order of Federal Energy Regulatory Commission originated in policy decision and not as outgrowth of factual determinations, standard of review was whether Commission's action was arbitrary; thus, scope of review was narrow and condition imposed on certificate of public convenience and necessity prohibiting gas company from using gas from offshore wells to fulfill commitment under contract to provide boiler fuel to power company would be sustained if it was reasonable under the circumstances. 5 U.S.C.A. § 706(2)(A).

15. Gas § 6

Having found that it was against public interest for natural gas to be used for boiler fuel during times of shortage when higher priority needs could not be filled, it was not unreasonable or arbitrary for Federal Energy Regulatory Commission to attach condition on transpor-

tation certificate to prohibit use of federal domain offshore gas as boiler fuel.

16. Gas § 13(3)

In absence of evidence that contractual needs of power company would not be fulfilled, order of Federal Energy Regulatory Commission prohibiting use by gas company of gas from offshore wells to fulfill commitment under contract to supply boiler fuel to power company did not discriminate against power company in favor of customers of pipeline company who used gas as boiler fuel on basis of lack of restrictions on sale of gas to pipeline company.

Petitions for Review of An Order of the Federal Energy Regulatory Commission.

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges.

RONEY, Circuit Judge:

Although the number of parties to this natural gas case, and the similarity of names, and the interrelation of each with the other, appear as complicated as a Russian novel, both the facts and the issues can be rather simply stated, even though the decision is difficult. This case involves sections 7(c) and 7(e) of the Natural Gas Act, 15 U.S.C.A. §§ 717f(c) and (e).

Amoco Production Company produced natural gas from new offshore wells. It is desired to use that gas to fulfill two old warranty contracts: one with Florida Power & Light Company, for boiler fuel; and one with Florida Gas Transmission Company, for resale to its customers, some of whom used the gas for boiler fuel. Under the Act a certificate of public convenience and necessity is required from the Federal Energy Regulatory Commission to

transport gas. 15 U.S.C.A. § 717f(c). For Amoco to get the offshore gas to Florida Gas terminals on shore, from which it then could be transported by Florida Gas, under existing certificates, to Florida Power & Light and to the customers of Florida Gas, certificates of public convenience and necessity were needed. In response to applications for such certificates, the Commission approved the transportation of the gas from the offshore wells to the onshore terminals, but so conditioned the certificates as to prohibit Amoco from using the gas for the Florida Power & Light boiler fuel contract.

Since the Commission had years ago approved the Florida Power & Light contract, Amoco argues that it could not condition these certificates in such a way as to prevent it from using offshore gas to fulfill the contract. The Commission contends it has the right to condition the certificates as it did under its authority to determine the priority of ultimate users of gas, due to the insufficient supply to meet all needs, and under its stated and approved policy that boiler fuel use has a low priority. Florida Power & Light asserts that even if that is so, the Commission has treated it unfairly because, while prohibiting it from using the gas as boiler fuel, it is permitting the gas to be used for Florida Gas' resale customers to use for boiler fuel.

In view of congressional and judicial decisions that public necessity overrides private concerns in natural gas regulation, we hold first, as a technical matter, that the Commission did not by the action here amend or modify its prior certificates, which it might not have the power to do, and second, that it acted within its authority in imposing the complained of conditions on these new certificates.

Persons having a direct interest in this case are the applicants for the certificates issued by the Commission:

Amoco Production Company, a subsidiary of Standard Oil Company of Indiana, Natural Gas Pipeline Company of America, Columbia Gulf Transmission Company, Sea Robin Pipeline Company, Tennessee Gas Pipeline Company, a division of Tenneco, Inc., and Fort Pierce Utilities Authority; and the purchasers of the natural gas covered by the certificates: Florida Power & Light Company (FP&L) and Florida Gas Transmission Company (FGT). Sea Robin Pipeline Company is not a party to this appeal. Another dozen or so parties having a possible interest in the case, but not represented on this review, are listed by counsel. Our reference to Amoco hereafter includes all parties who sought a certificate in this case and in whose interest it might be to reverse the Commission on this review.

Under review is a May 2, 1977 order of the Federal Energy Regulatory Commission imposing conditions on certificates of public convenience and necessity sought by Amoco for the transportation of gas from offshore wells to onshore pipeline terminals. Review is being sought under section 19(b) of the Natural Gas Act, 15 U.S.C.A. § 717r(b). See *Transcontinental Gas Pipe Line Corp.* v. *F.E.R.C.*, 589 F.2d 186, 188 (5th Cir. 1979).

The applications for certificates of public convenience and necessity filed with the Commission in late 1972 and 1976 were a part of Amoco's continuing program to deliver gas under two warranty contracts with FGT and FP&L approved by the Commission in 1965 and 1967. Underlying these applications are exchange and transportation agreements executed by Amoco and four interstate pipeline companies.[1] These agreements were de-

[1] The applications sought certificates under section 7(c) of the Act, 15 U.S.C.A. § 717f(c), authorizing exchange, transportation, and construction and operation of facilities:

(1) In Docket No. CP73-70, Columbia Gulf Transmission Company (Columbia Gulf) filed an application for a certificate authorizing construction and operation of facilities and exchange and transportation of gas for Amoco from certain fields in south Louisiana and the offshore Federal domain, for delivery to FGT at the point where Columbia Gulf's and FGT's pipelines intersect near Judice, Lafayette Parish, Louisiana.

(2) In Docket No. CP73-157, Natural Gas Pipeline Company of America (Natural) filed an application for a certificate authorizing exchange with Amoco in the West Johnson Bayou Field, Cameron Parish, Louisiana, which gas is delivered by Columbia Gulf to the FGT pipeline interconnection near Judice.

(3) In Docket No. CP77-37, Sea Robin Pipeline Company (Sea Robin) filed an application for a certificate authorizing transportation of Amoco's gas from offshore East Cameron Block 264 to the terminus of Sea Robin's pipeline near Erath, Louisiana, where the gas is received by Columbia Gulf and delivered to FGT's pipeline interconnection.

Sea Robin originally filed an application for a certificate authorizing the transportation of Amoco gas from East Cameron Block 264 on November 2, 1971. The Commission issued an order in May 1975 affirming the Administrative Law Judge's Initial Decision which dismissed Sea Robin's application without prejudice. The order stated that the present gas supply situation no longer afforded the "luxury" of using natural gas for boiler fuel, in the absence of special circumstances. *See also Sebring Utilities Commission* v. *F.E.R.C.*, 591 F.2d 1003, 1018 (5th Cir. 1979).

(4) In Docket No. CP77-31, Columbia Gulf and Tennessee Gas Pipeline Company, a Division of Tenneco, Inc. (Tennessee), filed a joint application for a certificate authorizing transportation of Amoco's gas from offshore West Cameron Block 617 to a delivery point in Vermilion Parish, Louisiana, and/or to a delivery point at the intersection of FGT's pipeline in St. Landry Parish, Louisiana.

(5) In Docket No. CI77-80, Amoco filed, under protest, an application for a certificate authorizing the gas exchange proposed by Columbia Gulf in Docket No. CP73-70.

(6) In Docket No. CI77-81, Amoco filed, under protest, an application for a certificate authorizing the gas exchange proposed by Natural in Docket No. CP73-157.

signed to move gas from Amoco's offshore leases to delivery points on FGT's pipeline in south Louisiana, where the gas is taken by FGT and transported to Florida for release to FGT's customers and for use by FP&L.

After evidentiary hearings on the applications and the submission of briefs the Commission issued its May 2, 1977 order granting certificates of public convenience and necessity, but imposing certain conditions on the certificates. Concluding that it would be against the public interest to authorize the use of Federal domain offshore gas for boiler fuel at a time of natural gas shortage, the Commission's conditions prohibited Amoco from supplying gas for transportation by FGT to FP&L for boiler fuel. Specifically Amoco challenges the following portions of the order:

1. Paragraph H which provides that gas produced from offshore Federal domain sources "shall be delivered to FGT only in satisfaction of the FGT warranty sale, and none of such gas shall be transported to FPL."

2. Paragraph D which requires Amoco to apply to the Commission for authorization before disconnecting the sources of supply used in the performance of the two warranty contracts.

3. Paragraph E which imposed delivery conditions in terms of field capacity instead of warranty volumes.

The other conditions imposed in the order are not before this Court on this appeal.

It seems clear at the outset that, were it not for the existing Commission-approved warranty sales contracts of Amoco with FP&L and FGT, the conditions on the certificates would have to be approved on this review. Although Amoco argues that the imposition of the conditions is not supported by substantial evidence, and FP&L argues that it is being treated unfairly vis-a-vis FGT, two issues which are treated later in this opinion, the central argument made on this petition for review is that the Commission's prior approval of the warranty contracts with FP&L and FGT prohibits it from conditioning these certificates so that offshore gas cannot be transported to FP&L for use as boiler fuel in satisfaction of the contracts.

Amoco argues that the action has the legal and practical effect of modifying the final certificates issued in 1965 and 1967 under section 7(c) of the Natural Gas Act. It contends such modification of a final certificate is beyond the statutory authority of the Commission under *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 67 S.Ct. 435, 91 L.Ed. 396 (1947), and its progeny, and an unlawful attempt to modify a settlement agreement approved by the Commission in 1967 and relied upon by the parties in planning performance of the contracts involved, citing *Texas Eastern Transmission Corp.* v. *F.P.C.*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941, 84 S.Ct. 347, 11 L.Ed.2d 273 (1963).

The Commission, on the other hand, contends that the prior certificates have not been amended or modified so as to bring the case within the contours of *Seatrain*, and that in any event, the Natural Gas Act provides and the Commission has long interpreted the Act to allow for amendment of final certificates where required by the public interest. We do not reach the second contention because, in our view, the action of the Commission did not amount to amendment or modification of prior final certificates.

We discuss the case in these terms: the Commission action was not an amendment or modification of the prior certificates; the Commission's prior actions did not otherwise prevent it from imposing restrictive conditions on the certificates; and the certificate conditions were within its lawful authority.

DID THE COMMISSION ACTION MODIFY FINAL SECTION 7 CERTIFICATES?

The two warranty contracts which obligate Amoco to supply gas to FGT and FP&L were entered into in November 1964 and March 1965. The FP&L contract

was modified in 1967. In June 1965 the Commission granted a certificate to FGT to construct and operate facilities into Florida necessary to transport gas supplied by Amoco to FP&L. In September 1965 the Commission granted a certificate to the predecessor of Amoco, then the Pan American Petroleum Corporation, to sell gas to FGT to perform the two warranty contracts. In reliance on the two warranty contracts, FGT invested 135 million dollars in facilities and construction. By another certificate order issued in May 1967 the Commission approved a settlement [2] respecting modifications of conditions imposed on the use of offshore Federal domain gas by Amoco in performance of the warranty contract with FP&L. The 1967 modifications agreed to by the parties to the warranty contracts and others and approved by the Commission permitted Amoco to add or withdraw offshore gas supplies, with the limitation that no more than 82% of the gas sold by Amoco to FP&L was to be produced from offshore fields. This provision was applicable to a 10-year period ending in June 1978. The 1977 order under review, however, prohibits connection of new offshore fields for use in connection with the FP&L contract and prohibits disconnection of certain onshore fields from the contracts with FGT and FP&L without prior authorization from the Commission.

Amoco's Sale to FP&L and the 1967 Certificate

[1] In March 1965 Amoco agreed to supply natural gas to FP&L. FP&L is an electric generating and distribution company operating within the State of Florida. Be-

[2] The May 29, 1967 order of the Commission approved a settlement involving Florida Gas Transmission Company, Pan American Petroleum Corporation (now Amoco), Austral Oil Company, Florida Power and Light Company, and the New York Public Service Commission. The settlement resolved disputes concerning implementation of the March 1967 certificate issued to FGT. *See* pp. 6009-6010, slip op. pp. 6009-6010, *infra*, for a discussion of the settlement modifications.

cause of air pollution problems caused by the use of other fuels, FP&L proposed to use gas purchased from Amoco for generating electricity in existing and new plants. The warranty contract governing the sale of this gas contained no commitment or dedication of specific leases or fields and was for a term of 20 years. Amoco's sale of gas to FP&L was not a sale for resale subject to the jurisdiction of the Commission although any interstate transportation of that gas was within Commission jurisdiction.

[2] Pursuant to a warranty contract entered into with Amoco, FGT agreed to transport the gas Amoco sold to FP&L from Louisiana to FP&L's generating facilities in Florida. That transportation service was subject to the provisions of the Act.

In March 1967 at the request of FGT the Commission granted a certificate of public convenience and necessity authorizing FGT to construct and operate additional facilities in order to increase its system capacity for the transportation of additional gas into Florida as a service for FP&L. This order approved Amoco's warranty contract with FGT, and Amoco was authorized by the Commission to supply gas in connection with this service. In approving the FGT warranty contract the Commission noted:

> An important consideration in our decision here flows from the nature of the Florida gas operations which we believe is dictated largely by the unique conditions which prevail in the Florida fuel market. As the Commission recognized in 1956, Florida is a fuel deficiency area and must depend almost entirely on imported fuels. . . . Because of the mild climate which prevails and the low degree-day deficiency the load factor of any pipeline supplying Florida would be relatively low if it were not for the firm industrial transportation of gas as is contemplated here.

In May 1967 the contract with FP&L was modified to provide that after 15 years from the date of initial deliveries, the "warranty" would be deleted and Amoco would have only the obligation to deliver to FP&L production from those wells then connected to FGT's system from which gas had been delivered to FP&L. The May 1967 order of the Commission modified the certificate to provide that up to 82%, instead of 85%, of the gas sold to FP&L could be produced from offshore Louisiana for ten years. As amended by the May 29 order, the condition provided:

> The gas sold by Pan American Petroleum Corporation [now Amoco] and Austral Oil Company [another seller] to FPL under the MMBTU Purchase Contract of March 12, 1965, as amended, shall be produced entirely within the Southern Louisiana area, Mississippi and other down-stream States; that from the date deliveries commence through ten years from such date the proportions of gas produced in the offshore fields (Federal Domain) of Southern Louisiana shall not exceed 82 percent of the total amount of gas produced in the South Louisiana area. The balance of the taxes shall be over the ten-year period. The ratio of the offshore-onshore takes from the Southern Louisiana area shall be reported to the Commission annually.

This order became final in June 1967 and deliveries to FP&L commenced shortly thereafter.

Amoco's Sale to FGT Under the 1965 Certificate

[3] FGT operates a major interstate gas pipeline which originates in Texas, follows the coast of the Gulf of Mexico eastward and terminates near Miami, Florida. In addition to transporting to Florida gas purchased in the field by electric generating companies such as FP&L, FGT purchases gas for resale. Such purchases involve

a sale in interstate commerce for resale, subject to the jurisdiction of the Federal Energy Regulatory Commission under section 1(b) of the Natural Gas Act, 15 U.S.C.A. § 717(b).

Unlike many gas purchase contracts, the warranty-type contract between Amoco and FGT does not contain a commitment or dedication of specific gas leases or fields to performance of the contract. Instead, the contract provides for sale to FGT of a specific quantity of gas, without reference to source of the gas, with Amoco undertaking a "warranty" that the total quality will be delivered without specification of sources. The contract was for a term of 20 years.

In a September 1965 order approving the warranty contract the Commission noted that

> [T]he producers who warranted to have the reserves available showed to the satisfaction of the Commission that there were in the area involved either known reserves, estimates of which appeared reasonable, or that current exploration activities in the area justified a conclusion that the total warranted reserves would not be available.

Notwithstanding its authorization of the warranty contract for the sale of gas by Amoco to FGT, the Commission expressed concern about the potential lack of regulatory control over the dedication and/or abandonment of gas reserves under warranty contracts stating:

> The technique has a potential disadvantage in that existing as well as yet undiscovered fields may be attached to a pipeline and abandoned without regulatory action in future years. Here Pan American (now Amoco) has indicated that the sales will be made from two specific fields, at least initially; namely, the North Freshwater Bayou Field and Offshore Block 14 Field. Pan American is (now Amoco)

an established company with a good record of continuing gas exploration and development. In the circumstances, and without intending a broad precedent we believe the proposed sale may be approved, but a better understanding of the implications of this type of sale may lead to a different view in the future.

To retain some oversight over the gas sales contemplated by the Amoco-FGT warranty contract, the Commission included the following conditions to the certificate:

(D) The certificate issued by paragraph (A) is subject to the following conditions:

(1) At such times as deliveries of gas by applicant to Florida Gas Transmission Company commence from any particular field, Pan American [now Amoco] shall file as a supplement to its related rate schedule, a letter notifying the Commission as to (a) the identity of each particular field involved and (b) the identity of each party whose share of gas produced therefrom is being delivered to Florida, including where applicable, copies of the appropriate instruments of ratification of said contracts by such party or parties;

* * * *

(3) Pan American [now Amoco] shall file a statement at such time as there is a cessation of deliveries of gas from any particular field notifying the Commission of the identity of the producers involved and the occurrence of cessation of such deliveries;

(4) The sale of gas under this certificate shall be limited to fields or reservoirs located within the south Louisiana area, as defined by the Commission's Statement of General Policy No. 61-1, as amended. In no event shall more than 50 percent of the gas sold under this certificate in any contract year originate

from areas outside the tax jurisdiction of the State of Louisiana.

* * * *

Additionally, the September 1965 certificate provided:

(C) The grant of the certificate issued in paragraph (A) above . . . is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Applicant. Further, our action in this proceeding shall not foreclose or prejudice any future proceedings or objections relating to the operation of any price or related provisions in the gas purchase contract herein involved.

Amoco accepted the certificate, deliveries commenced, and the order became final.

[4] Amoco argues that under 15 U.S.C.A. § 717f(e) of the Natural Gas Act the Commission has authority to attach conditions only at the time a certificate is granted, and the Commission has no authority to alter final certificates. Viewing the 1965 and 1967 certificates as the basis for necessity for seeking the additional certificates in the proceedings here, Amoco contends the May 1977 conditions unlawfully modify the certificates issued in 1965 and modified with Commission approval in 1967. Amoco asserts it has believed for 10 years that at the expiration of the 10-year 82% limitation it could use offshore gas to satisfy the FP&L contract without further restriction.

In our view, the initial certificates cannot be read as tantamount to a decision on the public convenience and necessity of every subsequent purchase or transportation that might in the future be desired by Amoco to comply with the contracts.

In reaching its decision to impose conditions, the Commission expressly observed that

> When the Commission granted a certificate to Amoco to sell gas to FGT and a certificate to FGT to transport and sell this gas and other gas Amoco would sell to FPL, [it] did not mean that the Commission undertook to grant all certificates necessary for Amoco to carry out its warranty obligations regardless of whether they might not be otherwise in the public interest.

Neither *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 81 S.Ct. 1611, 6 L.Ed.2d 869 (1961), nor *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 67 S.Ct. 435, 91 L.Ed. 396 (1947), upon which Amoco relies, requires a merger of the public convenience and necessity decision made in connection with the 1965 and 1967 certificates with that required for the 1977 certificates. Nor do they negate the statutory power and obligation of the Commission to condition certificates of public convenience and necessity as the public interest requires. Neither case fits the circumstances here.

In *Seatrain*, the Interstate Commerce Commission, having issued a certificate to a water carrier, subsequently reopened the certificate proceedings, revoked the certificate, and issued a new one under new terms. By contrast in this case, the Commission expressly refrained from reopening FGT's transportation certificate docket and limited itself instead to the then-pending applications.

In *Delta*, the Civil Aeronautics Board amended an airline route certificate on petitions for reconsideration, without notice or hearing. The amendment precluded Delta from serving cities on a route that had been approved by the original certificate. Rejecting the amendment the Supreme Court said, "all we hold is that the petitions cannot be granted and the certificated carrier's operations curtailed without notice or hearing." *Civil Aeronautics Board* v. *Delta*, *supra*, 367 U.S. at 327, 81 S.Ct. at 1620.

In the instant case the Commission followed proper notice and hearing procedures, and the subsequent applications for additional certificates were properly measured against the public necessity as required by 15 U.S.C.A. § 717f(e). Although its imposition of conditions on Amoco's applications for additional certificates undoubtedly affects the manner in which Amoco would thereafter be able to meet its obligations under the warranty contracts, the conditions attached to the issuance of new certificates only involved new sources of gas, and were based on the strain of the gas shortage and the public convenience and necessity, as required by section 7(e) of the Natural Gas Act, 15 U.S.C.A. § 717f(e).

[5, 6] While the 1965 and 1967 certificates may have contemplated that additional fields might be attached to FGT to satisfy the warranty contracts, the Commission did not, and could not, cast off its statutory obligation to judge future applications in light of the public interest at the time of consideration. *See Clark* v. *Gulf Oil Corp.*, 570 F.2d 1138, 1147 (3d Cir. 1977), *cert. denied*, 435 U.S. 970, 98 S.Ct. 1611, 56 L.Ed.2d 62 (1978). That it then intended not to bind itself in future determinations is reflected in the 1967 order, which provided:

> [T]his order is without prejudice to any finding or order which has been, or hereafter may be, entered by the Commission, and is without prejudice to any claim or contention which has been, or hereafter may be, made by the parties, the Commission Staff, or any other person or party affected by this order, in proceeding now pending, or hereafter instituted.

The new certificates did not modify the old.

[7] Rather than issuing the certificates as if no substantial change had occurred since 1967, the Commission was not foreclosed from taking into account the gas shortage at the time the new certificates were issued 10 years

later in 1977. Needless to say, public interests change from time to time. It seems, therefore, improper in a controlled industry to permit private parties to lock out such changes through contracts, albeit approved, which in effect prohibit that controlled industry from responding to those changing interests. Indeed the Commission is not required to approve blindly applications for certificates which may be sought in connection with the performance of long term contracts but is required to approve each such application taking into account current standards of public convenience and necessity. 15 U.S. C.A. § 717f(e).

DID THE COMMISSION'S PRIOR ACTIONS OTHERWISE PREVENT IMPOSITION OF THE RESTRICTIVE CONDITIONS?

An undercurrent in this case is the suggestion that the Commission has somehow acted unfairly because its actions in 1977 seemed to renege on what it is deemed to have promised by the 1967 action. We have therefore examined the case to determine if the action of the Commission has been unreasonable because it may seem inconsistent with prior decisions.

[8, 9] The record in this case does not put the question quite as boldly as it is argued. There is nothing to indicate that Amoco will not be able to meet its contract commitments. If it were otherwise, we would address the question anew. But there is no evidence on this record that Amoco will be unable to discover and produce gas from onshore fields to satisfy its obligations under the contracts. If Amoco cannot timely discover and commence production from new onshore fields, it will be forced to purchase gas to meet the warranty obligation to FP&L, probably at a higher cost. Cost alone, however, cannot be a determining factor in a review of the Commission's policy determinations during a natural gas shortage.

We do not say that a producer in Amoco's situation could never prevail upon this argument. Amoco cannot prevail on this record.

So far as FP&L is concerned, this record is not as reassuring as it might be respecting Amoco's ability to meet its warranty contract. The availability of the gas to Amoco, say in Texas or North Louisiana, does not get the gas to Florida, where FP&L needs it and obviously expects to receive it. FERC approval of transportation to Florida is required. As in Amoco's situation, in which we recognize that if it cannot meet its contract demands "we would address the question anew," we might have to face the same problem if FP&L itself, or through a pipeline transporter, cannot get the warranty contract gas delivered to it in Florida because of FERC's denial of transportation permits.

[10] The difficulty of rate and supply regulation of natural gas is too well known to require documentation here. It is well established, however, that the overall purpose of the Natural Gas Act is to protect the interest of consumers in an adequate supply of gas and at reasonable rates, *see California* v. *Southland Royalty Co.*, 436 U.S. 519, 523, 98 S.Ct. 1955, 56 L.Ed.2d 505 (1978); *Sunray Mid-Continent Oil Co.* v. *F. P. C.*, 364 U.S. 137, 147, 151-154, 80 S.Ct. 1392, 4 L.Ed.2d 1623 (1960); *Clark* v. *Gulf Oil Corp.*, *supra* at 1145, and that "Congress has delegated under its comprehensive scheme extensive regulatory powers to the Commission in an essential and monopolistic industry to grant certificates of public convience when the public welfare dictates . . . ." *Id.* at 1149. *See Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 391, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959). When applying the provisions of the Natural Gas Act, courts have consistently recognized that the Act gives the Commission broad authority to limit or proscribe contractual arrangements that contravene

relevant public interests. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 783-784, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956).

[11] The imposition of conditions in this case by the Commission under 15 U.S.C.A. § 717f(e) must be held to be a reasonable accommodation between the conflicting contractual interests on one hand and public regulation on the other. *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra* at 344, 76 S.Ct. 373.

WERE THE CONDITIONS WITHIN THE COMMISSION'S LAWFUL AUTHORITY?

[12] Although Amoco argues that the substantial evidence standard of review is applicable, we view the case as one where the policies of the Commission are under attack, and its action can be set aside only if found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. *See Superior Oil Co.* v. *F. E. R. C.*, 563 F.2d 191, 201 (5th Cir. 1977).

[13] The question is whether the Commission can impose conditions on certificates of public convenience and necessity which, if upheld, guard the interests of "high priority" users of natural gas at a time of shortage, but make more difficult the performance by Amoco of warranty contracts for the supply of gas to "low priority" users. The Commission has the authority to impose conditions on certificates of public convenience and necessity. 15 U.S.C.A. § 717f(e) provides that "[t]he Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[14] Amoco argues that the Commission's power to attach conditions to a certificate is governed by the substantial evidence standard. *See, e.g., Texaco, Inc.* v. *F. P. C.*, 290 F.2d 149, 155 (5th Cir. 1961); *California Oil Co., Western Division* v. *F. P. C.*, 315 F.2d 652, 656 (10th Cir. 1963); *Pure Oil Co.* v. *F. P. C.*, 292 F.2d 350, 352 (7th Cir. 1961). Recently this Court ruled in *Transcontinental Gas Pipe Line* v. *F. E. R. C.*, 589 F.2d 186, 190 (5th Cir. 1979), that "[a]ny attack on a condition in a certificate issued by the Commission must confront the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity."

The Commission, in reaching its decision to impose conditions on the certificates of public convenience and necessity sought by Amoco, concluded:

> We are here acting as a matter of policy to conserve natural gas for the most essential uses. Because of the current shortage, which affects most of our actions which respect to natural gas, to permit additional exchanges of gas and the construction and operation of new facilities to enable boiler fuel sales for power plant operation to continue unabated would be perverse in the circumstances and contrary to our policies exercised elsewhere. While in the past we have granted many certificates that involved boiler fuel sales we also refused to do so where the circumstances did not support them. [cases omitted].

Where, as here, the order of the agency orignate[s] in a policy decision and not as an outgrowth of factual determinations, the standard of review is whether the Commission's action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A); *Superior Oil Co.* v. *F. E. R. C., supra* at 201. Accordingly, the scope of our review in the instant case is

narrow, and the conditions imposed on the certificates of public convenience and necessity must be sustained if they are reasonable under the circumstances. *See Permian Basin Area Rate Cases, supra*, 390 U.S. at 767, 88 S.Ct. 1344; *F. P. C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

[15] Under such standard of review, the conditions under attack must be upheld. The Commission's curtailment policies, upheld by this Court, hold boiler use to be of low priority. *See Louisiana* v. *F. P. C.*, 503 F.2d 844, 858-860 (5th Cir. 1974). Having found that it is against the public interest for natural gas to be used for boiler fuel during times of shortage when higher priority needs cannot be filled, it is not unreasonable or arbitrary to attach conditions on a transportation certificate to prohibit boiler use of Federal domain offshore gas.

Amoco offered no evidence to show why the Commission's policy of assigning a low priority to the use of gas for boiler fuel should not apply to this proceeding. In *F. P. C.* v. *Transcontinental Pipe Line Corp.*, 365 U.S. 1, 81 S.Ct. 435, 5 L.Ed.2d 377 (1961), characterizing the issue as "whether Congress intended to preclude the Commission from denying certification on the basis of the policy considerations advanced by its staff," *id.* at 6, 81 S.Ct. at 438, the Court observed:

> No one disputes that natural gas is a wasting resource and that the necessity for conserving it is paramount. As we see it, the question in this case is whether the Commission, through its certification power, may prevent the waste gas committed to its jurisdiction. One apparent method of preventing waste of gas is to limit the uses to which it may be put, uses for which another, more abundant fuel may serve equally well. Thus the Commission in this case, as it often has in the past, has declared that the use

> of gas under industrial boilers is an "inferior" use, the assumption being that other fuels, particularly coal, are an adequate substitute . . . .

Id. at 8, 81 S.Ct. at 439 (footnotes omitted). The Supreme Court therefore approved the controlling weight given by the Commission to its boiler fuel policy. And so we must here.

[16] FP&L contends that the Commission's orders discriminate unfairly against it and favor FGT's customers who use gas as boiler fuel. Although FP&L's standing might be questioned, since there is no evidence in this record that its contract needs will not be fulfilled, we nevertheless decide contrary to the argument made. Most of FGT's customers are residential and small commercial gas users. The Commission observed that of the near 2% of its annual volume which is sold to industrial customers, most of that gas did not go to boiler fuel users, because most of FGT's industrial customers are not boiler fuel users. In any event FGT has been ordered to file a curtailment plan which assigns boiler fuel a low priority. *Lehigh Portland Cement Co.* v. *Florida Gas Transmission Co.*, Docket No. RP75-79 (June 24, 1977). *See also Sebring Utilities Commission* v. *F. E. R. C.*, 591 F.2d 1003, 1007-1008 (5th Cir. 1979). Although of no particular significance to the decision of this point, we do note that all parties were given an opportunity to be heard at the proceedings held before the Commission. FP&L chose not to participate in the evidentiary hearings.

Having dealt with the arguments according to the law as we understand it, the orders of the Commission here under review must be affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 77-2869

F. E. R. C. No. C-65-393, *et al.*
FLORIDA POWER & LIGHT COMPANY and
AMOCO PRODUCTION COMPANY,
Petitioners,
versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petitions for Review of an Order of the Federal Energy Regulatory Commission

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges

JUDGMENT

This cause came on to be heard on the petitions of Florida Power & Light Company and Amoco Production Company for review of an order of the Federal Energy Regulatory Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Federal Energy Regulatory Commission in this cause be, and the same is hereby affirmed.

July 5, 1979

A true copy

Test: EDWARD W. WARDSWORTH
Clerk, U.S. Court of Appeals
Fifth Circuit

By /s/ Sally Hayward
SALLY HAYWARD
Deputy
New Orleans, Louisiana
[Aug. 3, 1979]

Issued as Mandate: Jul. 27, 1979

APPENDIX C

DC-B-10

CERTIFICATES (Transportation),
CERTIFICATES (End Use),
END USE, PUBLIC INTEREST

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman;
Don S. Smith,
John H. Holloman III, and
James G. Watt.

Docket Nos. CP65-393

FLORIDA GAS TRANSMISSION COMPANY

CI65-584, CI77-80, CI77-81,

AMOCO PRODUCTION COMPANY, A SUBSIDIARY OF
STANDARD OIL COMPANY OF INDIANA

CI73-70, CP77-31

COLUMBIA GULF TRANSMISSION COMPANY

CP73-157

NATURAL GAS PIPELINE COMPANY OF AMERICA

CP77-31

TENNESSEE GAS PIPELINE COMPANY,
A DIVISION OF TENNECO INC.

CP77-37

SEA ROBIN PIPELINE COMPANY

ORDER GRANTING AND CONDITIONING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

(Issued May 2, 1977)

In this proceeding application is made for certificates of public convenience and necessity under Section 7 of the Natural Gas Act to authorize the exchange and transportation of natural gas to permit Amoco Production Company to supply gas to Florida Gas Transmission Company (FGT) under two warranty contracts. Under a contract of November 20, 1964, Amoco was to deliver 584,400,000 Mcf of gas (15.025 psia) to FGT largely for resale to distributing companies in Florida, in part for boiler fuel use. By order of June 8, 1965, the Commission granted a certificate to FGT to construct and operate the necessary facilities and to sell and deliver the gas,[1] and by order of September 15, 1965, granted a certificate to the predecessor of Amoco to make this sale.[2] As of September 30, 1976, 49 percent of the gas, or 288,465,412 Mcf, had been delivered and 295,934,588 Mcf remained to be delivered. (Tr. 51, 116).

On March 12, 1965, Amoco entered into a contract with Florida Power & Light Company (FPL) as modified and supplemented August 4, 1967, by which Amoco was to deliver gas to FGT for transportation to FPL for boiler fuel use. The volumes were to be 200,000 MMBTU per day for the first fifteen years, after which Amoco would continue to deliver gas from those wells still capable of production. This sale was not jurisdictional, but the Commission issued a certificate to FGT to construct

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[1] *Florida Gas Transmission Co.*, Docket No. CP65-165, 33 FPC 1223 (1965).

[2] *Pan American Petroleum Corp.*, Docket No. CI65-584, 34 FPC 852 (1965).

facilities and to transport the gas.[3] As of September 30, 1976, approximately 55 percent of the gas or 604,574,804 Mcf had been delivered and 488,400,000 Mcf remained to be delivered (Tr. 51, 117). FGT's evidence shows that in reliance on the two warranty contracts it invested approximately $135 million in facilities and constructed approximately 38 percent of the present average day capacity of its pipeline (Tr. 117). Staff calls attention to a procedure by which the first 200,000 MMBtu per day, or approximately 193,000 Mcf per day, would go to FPL but this arrangement is subject to other proceedings (Tr. 59-67, 213-214).

In order to meet its contract requirements Amoco entered into an arrangement with the Sea Robin Pipeline Company to transport a portion of the production from its reserves developed in East Cameron Block 264, offshore Louisiana, and Sea Robin filed an application with the Commission in Docket No. CP72-119. On May 16, 1975, the Commission denied the certificate without prejudice saying that the gas supply no longer afforded the luxury of using natural gas for boiler fuel, in the absence of special circumstances not shown. At the same time the Commission issued an order in Docket Nos. CI65-584 and CP65-393 directing Amoco and FGT to show cause why the certification of the sales of gas by Amoco to FGT and of the transportation of gas by FGT to FPL should not be amended, limited or otherwise modified.

On December 12, 1972, Natural Gas Pipeline Company (Natural) filed an application in Docket No. CP73-157 for authorization to exchange gas from the West Johnson Bayou Field, Cameron Parish, south Louisiana, with Amoco to enable Amoco to sell such gas under its warranty contracts to FGT and FPL. For this purpose Natural and Amoco entered into an exchange agreement

[3] *Florida Gas Transmission Company*, Docket No. CP65-393, 37 FPC 424 (1967).

dated August 7, 1972, (Ex. 1) which provides that Amoco would deliver exchange quantities of gas reflecting a 50 percent interest in certain reserves of Amoco in the Field and Natural would redeliver equivalent volumes for Amoco's account at Texaco, Inc.'s Henry Processing Plant in Vermilion Parish, Louisiana. Because the proposed transaction involves an even exchange no transportation service is involved and no payments, rates or other compensation are provided in the exchange agreement. The remaining 50 percent of the reserves in the Field are being sold to Natural by Amoco under a purchase contract dated August 23, 1972 (Ex. 2). Amoco's witness Pearson stated that the estimated gas reserves in the West Johnson Bayou Field as of July 1, 1977, for which authority to exchange is being sought, amounted to 7,331 MMcf and the gas delivery rate would be 5.3 MMcf per day (Tr. 78, 85). Amoco's witness Harris said with respect to the gas at this field it is possible that Amoco would have available an intrastate as well as an interstate market and that the most advantageous deal that can be worked out would be recommended to management (Tr. 45-46).

On September 12, 1972, Columbia Gulf Transmission Company in Docket No. CP73-70 filed an application for a certificate, amended on April 22, 1974, for authorization to construct facilities and to exchange and transport gas from various fields in south Louisiana and the offshore Federal Domain in order to permit Amoco to utilize such gas in its sales to FGT and FPL (Tr. 34-35). Amoco's corresponding application in Docket No. CI77-80 was filed on October 26, 1976. There is involved here a gas exchange and transportation agreement dated July 31, 1972, between Amoco and Columbia Gulf providing for the exchange and transportation of 50 percent of Amoco's East Cameron Block 33 gas reserves for delivery for Amoco's account to FGT near Judice, Louisiana, and for the transportation of volumes from Sea Robin. Amoco

would pay Columbia Gulf .434 cents per Mcf for the exchange and transportation to the FGT redelivery point and 1.25 cents per Mcf for constructing and operating the facilities to allow the gas to enter FGT's pipeline. By a separate purchase and sales agreement, also dated July 31, 1972, Amoco sells the remaining 50 percent of its Block 33 reserves to Columbia Gas Transmission Corporation.

The exchange and transportation agreement was amended on March 7, 1974, to provide for receipt of 50 percent of Amoco's gas in the Lake Boudreaux Field, Terrebonne Parish, Louisiana. For the transportation of this gas Amoco would pay a charge of 2.28 cents per Mcf. A separate gas purchase and sales agreement, also dated March 7, 1974, covers the remaining 50 percent of Amoco's Lake Boudreaux reserves (Tr. 36).

Witness Pearson testified that, as estimated as of July 1, 1977, East Cameron Block 33 would add reserves of 4,372 MMcf and sales of 6.8 MMcf per day and Lake Boudreaux 7,745 MMcf in reserves and 4.7 MMcf per day in sales (Tr. 85). Witness Harris recommended that if the Block 33 gas were not delivered as proposed it should be sold to Columbia and said that the Lake Boudreaux gas could be sold intrastate since Louisiana Intrastate Gas Corporation was purchasing gas from the Field (Tr. 45).

After dismissal of its original application and the show cause proceeding, as related below, Sea Robin on October 27, 1976, in Docket No. CP77-37 filed a modified application covering reserves of 10,645 MMcf in East Cameron Block 264 in the offshore Federal Domain. For this purpose a new transportation agreement was entered into on October 13, 1976, with provisions essentially the same as the previous agreement. Sea Robin agreed to transport a quantity of gas up to, but not to exceed, the quantity of gas purchased by Sea Robin from Amoco at Block 264 at a transportation charge of 24.64 cents per Mcf (Tr.

244-245). Columbia Gulf would receive the gas at the Sea Robin pipeline terminus and deliver it at Columbia Gulf's interconnection with FGT's pipeline (Tr. 54).

On October 26, 1976, Columbia Gulf and Tennessee Gas Pipeline Company, a Division of Tenneco Inc., in Docket No. CP77-31 filed an application for a certificate in which they propose to transport for Amoco up to 50 percent of the gas to be produced from Block 617, West Cameron Area, offshore Louisiana in the Federal Domain. They will redeliver the gas to Amoco or for Amoco's account at a measuring station in Vermilion Parish, Louisiana (Tr. 258). There are two agreements involved, both dated September 10, 1976. One is a gas sales contract between Amoco and Columbia Gas and Tennessee committing Amoco's interest in the Block 617 gas with a reservation by Amoco of 50 percent of the gas for its own use in meeting its warranty obligations. The other is a transportation agreement between the same parties involving the transportation of the reserved 50 percent for delivery onshore to Amoco (Tr. 260). It is estimated that gas reserves of 16,681 MMcf would be available for transportation (Tr. 104).

All of the applications relating to the exchange with and transportation of gas for Amoco were consolidated with the FGT proceeding in Docket No. CP65-393 by the Commission orders of October 8, 1976, November 12, 1976, and November 26, 1976. On October 8, 1976, after a motion by FGT which was joined in by the Attorney General of Florida and supported by the Florida Public Service Commission, the Commission dismissed the show-cause proceeding on the ground it was not appropriate to raise issues concerning the continued use of FGT's pipeline capacity to satisfy contracts for the delivery of gas to be used as boiler fuel. The Commission said, however, that:

> "It is important, however, for the Commission to determine whether to permit the use of Columbia and Natural facilities to assist in the delivery of gas that is ultimately utilized for boiler fuel".

As a result the Commission set the applications for the exchange of gas in the Columbia Gulf, Docket No. CP73-70, and Natural Docket No. CP73-157, for hearing to determine if the proposed activities serve the public interest, and the other dockets were later consolidated.

Hearings were held on November 16 and 17 and December 7, 1976, before Presiding Administrative Law Judge Thomas L. Howe. As a result of a motion before the Judge the Commission by order of December 20, 1976, waived the intermediate decision procedure and adopted the Judge's briefing schedule. Initial briefs were filed by FGT, Amoco, Peoples Gas System, Inc., the Florida Commission, City Gas Company of Florida, Sea Robin, Columbia Gulf, Florida Cities,[4] Natural and the staff, and jointly Southern Gas Company, Gainesville Gas Company and Gulf Natural Gas Corporation (Southern). Reply briefs were filed by City Gas Company, Florida Cities, and Amoco.

Amoco argues that the certificates authorizing its sale of gas to FGT, *Pan American Petroleum Corp.*, Docket No. CI65-584, 34 FPC 852 (1965), and the transportation of its gas sold to FPL, *Florida Gas Transmission Co.*, Docket No. CP65-393, 37 FPC 424 (1967), both contemplate the connections and deliveries proposed here, that FGT has need for the gas, and there is no need for conditioning the certificates.

[4] Ft. Pierce Utility Authority of the City of Ft. Pierce, Gainesville-Alachua County Regional Electric Water and Sewer Utilities, the Sebring Utilities Commission, and the Cities of Homestead, Kissimmee, Lakeland, Starke, and Tallahassee.

FGT argues that it is heavily dependent on the warranty volumes and failure to authorize expeditiously the pending proposals will cause further detriment to its customers because Amoco might, wastefully, have to construct its own facilities into the Gulf of Mexico to meet its obligations.

City Gas Company argues that Commission policy favors the protection of warranty sales citing *Gulf Oil Corporation*, Opinion No. 692, 51 FPC 1340 (1974).[5] Also City Gas points out that FGT spent $42 million on facilities to increase its daily capacity to enable it to handle the supply for Amoco for its system (Tr. 116) and $93 million to render a firm transportation service to FPL. City Gas notes that FGT is curtailing 48 percent of its total requirements exclusive of transportation gas as estimated for the 12-month period ending August 31, 1977, and 28 percent of its total requirements even if the gas here involved is permitted to flow to FGT (Ex. 7, 7B). City Gas contends that without some industrial load some of the smaller gas systems could not live, but the new gas from Amoco would not go to the transportation service for boiler fuel use (Exs. 7, 7B).

Similar arguments were made in favor of granting the certificates by Natural, Southern, Florida Cities, Columbia Gulf, Sea Robin, the Florida Commission, and Peoples Gas with the emphasis on the need for the gas by the customers in Florida. Florida Cities say that a change in policy with regard to boiler fuel use can be made only after a full hearing and an adequate record for a departure from the present curtailment plan. The Florida Commission is concerned with the increase in rates to residential customers as commercial and industrial sales diminish and argues that the unique nature of warranty

[5] See *Gulf Oil Corp.*, —— FPC ——, Opinion No. 780, Docket No. CI64-26 (Oct. 15, 1976); on rehearing —— FPC ——, Opinion No. 780-A (Dec. 9, 1976).

contracts requires that new reserves be connected from time to time to maintain delivery levels.

In its brief staff says that it will not argue the validity of FGT's curtailment plan involved in *Lehigh Portland Cement Company* v. *Florida Gas Transmission Company*, Docket No. RP75-79, but takes the position that the applications should be granted conditionally. The gas to be produced from onshore locations can be sold in intrastate commerce. Therefore the onshore West Johnson Bayou and Lake Boudreaux gas should be permitted to be delivered to FGT and FPL according to the currently effective provisions, as they may be modified by future Commission action in other proceedings. However, with respect to volumes assignable to offshore production the applications should be granted with the condition that the gas should be allotted to FGT in satisfaction of the Amoco-FGT warranty sale so that none of these volumes is delivered to FPL.

The staff argues that at the current level of deliveries (Tr. 88) the FPL contract demand is being met so that the onshore production will provide additional volumes to the curtailed FGT resale customers, and otherwise might be lost to intrastate commerce. However, in a period of natural gas shortage permitting the offshore Federal Domain reserves to be burned for boiler fuel is not in the public interest. As the staff says, the evidence shows that Amoco will be able to meet the FPL contract requirement of 200,000 MMBtu per day from presently available reserves throughout 1978 (Tr. 95). Staff does not believe that its position would impair Amoco's ability to meet its warranty contract obligations to FPL while preserving offshore, Federal Domain, gas for higher priority uses than boiler fuel.

In the opinion of the Commission the granting of a certificate at this time to provide an additional gas supply for boiler use, in the absence of peculiar circumstances, would not be in the public interest. The fact that

there is a warranty contract involved, which was the basis of a certificate issued by the Commission does not alter the situation. When the Commission granted a certificate to Amoco to sell gas to FGT and a certificate to FGT to transport and sell this gas and other gas Amoco would sell to FPL did not mean that the Commission undertook to grant all certificates necessary for Amoco to carry out its warranty obligations regardless of whether they might not be otherwise in the public interest. However, as the staff points out, the onshore gas, if it is not sold to FGT, could be sold in intrastate commerce for any use whatever. Therefore, certificates for the transportation or exchange of this gas should be granted without condition. In any case only part of it would be used for boiler fuel.[6] Thus we shall grant the application of Natural in Docket No. CP73-157 and the corresponding application of Amoco in Docket Nos. CI77-81 relating to the exchange of gas from the West Johnson Bayou Field, and the application of Columbia Gulf in Docket No. CP73-70 and the corresponding application of Amoco in Docket No. CI77-80, insofar as they relate to the exchange of gas from the Lake Boudreaux Field. This would increase the volumes flowing to FGT by 5.3 MMcf for the West Johnson gas and 4.7 MMcf for the Lake Boudreaux gas. Under the procedure referred to above by which the first 193,000 Mcf per day would go to FPL, the amount of gas left for FGT may be less in the future as the deliverability of the fields decreases.

With respect to the offshore gas in the Federal Domain we shall condition the certificates to provide that the gas involved shall be delivered to FGT only in satisfaction of the Amoco-FGT warranty sale. This applies to Columbia

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[6] FGT provides firm resale service for residential and small commercial customers. It also sells about 2 percent of annual volumes to direct industrial customers, and other gas to direct and resale interruptible industrial customers, many of which are not boiler-fuel customers. (Tr. 114-115; Ex. 8).

Gulf's application in Docket No. CP73-70 and Amoco's application in Docket No. CI77-80 relating to East Cameron Block 33 offshore, Columbia Gulf's and Tennessee's applications in Docket No. CP77-31, relating to the transportation of Amoco's gas from West Cameron Block 617 offshore, and Sea Robin's application in Docket No. CP77-37 relating to the transportation of gas from offshore East Cameron Block 264.

Amoco argues that the imposition of the conditions proposed by the staff would, in effect, alter or modify the original certificates. It notes that neither the original certificates nor the conditions attached to them even suggest that gas produced from the offshore, Federal Domain cannot be used to satisfy Amoco's contract with FPL. It notes that the original certificate provided that 85 percent of the gas supplied to FPL can be produced offshore (37 FPC at 443) and this was later amended to provide that no more than 82 percent of the gas could come from the offshore sources (37 FPC at 994). If the Commission rules that none of the offshore gas involved here can be delivered to FPL, Amoco says that the certificate will be modified.

In our opinion there is no modification of the certificate. While we approved the arrangement for the transportation of gas by FGT from Amoco to FPL, the certificate did not limit the Commission in denying or conditioning applications for certificates to sell or transport further gas supplies to FPL. The provision that the proportion of the gas from offshore shall not exceed 82 percent does not mean that FGT has a certificated right to transport offshore gas to FPL. In any case the provision expires in 1978, ten years after deliveries commenced. (Tr. 117).

We are here acting as a matter of policy to conserve natural gas for the most essential uses. Because of the current shortage, which affects most of our actions with respect to natural gas, to permit additional exchanges of

gas and the construction and operation of new facilities to enable boiler fuel sales for power plant operation to continue unabated would be perverse in the circumstances and contrary to our policies exercised elsewhere. While in the past we have granted many certificates that involved boiler fuel sales we also refused to do so where the circumstances did not support them. For example *Commonwealth Natural Gas Corp., et al.*, 9 FPC 70, 87 (1950; *Mississippi River Fuel Corp.*, 12 FPC 109, 112-113 (1953); *South Georgia Natural Gas Co.*, 22 FPC 211, 215 (1959); *Alabama-Tennessee Natural Gas Company*, 49 FPC 160, 162 (1973). In *Transcontinental Gas Line Corporation*, 21 FPC 138 (1959) the Commission denied a certificate to Transco to transport gas for Consolidated Edison Company purchased in the field and to be burned in generating stations in New York City. As a policy consideration the Commission pointed out that authorization of this request would preempt pipeline capacity which would otherwise be available to meet more urgent and widely beneficial public needs and raise prices in the field. Further, the Commission said, the purpose for which the sale would be made is something less than desirable. The Supreme Court affirmed the Commission in *F.P.C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1 (1961). There the Court referred to the various contentions, including the inferior use of the gas and noted that these contentions were presented as "policy" arguments and no testimony was taken in support. The Court discussed the authority of the Commission and concluded that the "end-use" factor was properly of concern to the Commission. In the same way we are convinced that we should not certificate the transportation of additional offshore gas from the Federal Domain to be burned in power plant boilers.

The Commission further finds:

(1) Applicants (Amoco, Columbia Gulf, Natural, Tennessee and Sea Robin are natural gas companies within the meaning of the Natural Gas Act.

(2) The exchange, in effect sales, and transportation hereinbefore described, as more fully described in the applications in this proceeding will be made in interstate commerce subject to the jurisdiction of the Commission and such exchanges and transportation together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefore, are subject to the requirements of subsection (c) and (e) of Section 7 of the Natural Gas Act.

(3) Applicants are able and willing properly to do the acts and perform the services proposed and to conform to the provisions of the Natural Gas Act and the requirements, rules, and regulations of the Commission thereunder.

(4) The exchange and transportation of natural gas by Applicants, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, is required by the public convenience and necessity; and certificates therefor should be issued as hereinafter ordered and conditioned.

The Commission orders:

(A) Certificates of public convenience and necessity are issued authorizing Applicants to exchange and transport natural gas in interstate commerce, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, all as more fully described in the applications in these dockets, upon the terms and conditions of this order.

(B) The certificates issued to the pipeline Applicants by paragraph (A) above and the rights granted thereunder are conditioned upon such Applicants' compliance with all applicable Commission Regulations Under the Natural Gas Act particularly the general terms and conditions set forth in Part 154 and in paragraphs (a), (c),

(e), (f) and (g) of Section 157.20 of Regulations. Such Applicants are required to complete any necessary construction and commence transportation services within one year from the date of the order (Section 157.20(b)).

(C) The certificate issued to Amoco in Ordering Paragraph (A) above is not transferable and shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations, and orders of the Commission.

(D) The certificate issued to Amoco in Ordering Paragraph (A) above shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act or of Part 154 or Part 157 of the Commission's Regulations thereunder and is without prejudice to any findings or orders which have been or which may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Applicant. Further, our action in this proceeding shall not foreclose or prejudice any future proceedings or objections relating to the operation of any price or related provisions in the gas purchase contracts herein involved. The grant of the certificates aforesaid for service to the particular customer involved does not imply approval of all of the terms of the contract, particularly as to the cessation of the service upon termination of said contract as provided by Section 7(b) of the Natural Gas Act. The grant of the certificate aforesaid shall not be construed to preclude the imposition of any sanctions pursuant to the provisions of the Natural Gas Act for the unauthorized commencement of any sales of natural gas subject to said certificate.

(E) Pursuant to Order No. 539-B, *Order Clarifying Prior Orders And Amending Section 157 Of The Commission's Regulations Under The Natural Gas Act*, Docket No. RM76-8 (issued July 30, 1976); the Commission's Regulations were amended to include new Section 157.41, which requires the following language be

inserted as a condition in all certificates of public convenience and necessity issued on or after July 30, 1976:

> All persons making jurisdictional sales pursuant to the authority granted by this certificate are hereby given notice that the contractual obligations between the buyer and the seller are incorporated into the certificate obligations, and that the certificate is further conditioned to require that the seller shall observe the standard of a prudent operator to develop and maintain deliverability from reserves dedicated hereunder.

(F) Amoco's rate schedules as submitted in its applications in Docket Nos. CI77-80 and CI77-81 are accepted for filing effective on the date of initial delivery. Amoco shall advise the Commission in writing of such dates within 10 days thereof.

(G) Amoco's rate schedules are designated as follows:

Docket No.	*Description*	*Designation*
CI77-80	Exchange Agree. 7-31-72	Amoco Production Company FPC Gas Rate Schedule No. 736 Supplement No. 1, thereto
CI77-81	Exchange Agree. 8-7-72	Amoco Production Company FPC Gas Rate Schedule No. 737

(H) The certificates granted in Paragraph (A) to Columbia Gulf in Docket No. CP73-70 and to Amoco in Docket No. CI77-80 insofar as they relate to East Cameron Block 33 offshore, and the certificates issued to Columbia Gulf and Tennessee in Docket No. CP77-31 relating to the transportation of Amoco's gas from West Cameron Block 617 offshore, and the certificate issued to Sea Robin in Docket No. CP77-37 relating to the transportation of Amoco's gas from offshore East Cameron Block 264 are conditioned to provide that the gas involved shall be delivered to FGT only in satisfaction of the

Amoco-FGT warranty sale, and none of such gas shall be transported to FPL.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

APPENDIX D

CERTIFICATES (Transportation)
CERTIFICATES (End Use)
END USE, PUBLIC INTEREST
CERTIFICATES (Amendment)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, and John H. Holloman III.

Docket Nos. CP65-393

FLORIDA GAS TRANSMISSION COMPANY

CI65-584, CI77-80, CI77-81,

AMOCO PRODUCTION COMPANY, A SUBSIDIARY OF STANDARD OIL COMPANY OF INDIANA

CI73-70, CP77-31

COLUMBIA GULF TRANSMISSION COMPANY

CP73-157

NATURAL GAS PIPELINE COMPANY OF AMERICA

CP77-31

TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

CP77-37

SEA ROBIN PIPELINE COMPANY

ORDER DENYING REHEARING

(Issued July 27, 1977)

Amoco Production Company and Florida Power & Light Company (FPL) on June 1, 1977, have filed applications for rehearing with respect to the Commission's order granting and conditioning certificates of public convenience and necessity issued May 2, 1977. In that order the Commission granted certificates to Amoco and the pipelines to exchange and transport gas to deliver gas to Florida Gas Transmission Company (FGT) to meet Amoco's obligations under two warranty contracts. Under one contract Amoco was to deliver gas to FGT largely for resale to distributing companies in Florida, in part for boiler fuel use. By orders of June 8, 1965, and September 15, 1965, the Commission granted certificates for this sale.[1] Under the other contract Amoco was to deliver gas to FGT for FPL and the gas would be transported by FGT to FPL's power plants for boiler fuel use. The Commission issued a certificate for this transportation on March 1, 1967, in Opinion No. 516.[2]

In issuing certificates on May 2, 1977, the Commission imposed a condition relating to offshore gas beyond state jurisdiction to provide that the gas involved shall be delivered to FGT only in satisfaction of the Amoco-FGT warranty sale, and none of such gas shall be transported to FPL.

Both Amoco and FPL argue that the Commission has modified its certificate authorizing the T-3 transportation service for the gas being delivered to FPL's power plants. As they point out, Opinion No. 516 provided that the

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[1] *Florida Gas Transmission Co.*, Docket No. CP65-165, 33 FPC 1223 (1965); *Pan American Petroleum Corp.*, Docket No. CI65-584, 34 FPC 852 (1965).

[2] *Florida Gas Transmission Company*, Docket No. CP65-393, 37 FPC 424 (1967).

proportion of gas produced in the off-shore fields of Southern Louisiana shall not exceed 85 percent of the total amount of the gas produced in the Southern Louisiana area, but on May 29, 1967 [3] this provision was amended so "that from the date deliveries commence through ten years from such date the proportions of gas produced in the off-shore fields (Federal Domain) of Southern Louisiana shall not exceed 82 percent of the total amount of gas produced in the South Louisiana area". Amoco says that the ten year period expires on June 9, 1978, and thereafter Amoco could use offshore gas exclusively. Further, it says, in planning for its continued performance of the FPL contract, it has relied upon the condition as being the only one with which it would have to comply when connecting additional reserves. In imposing the present restriction Amoco says the Commission has added a new condition. FPL says that it is not arguing that the Commission has automatically pregranted every certificate application which Amoco may file for the purpose of attaching new supplies to meet the Amoco-FPC warranty contract, but it does argue that the Commission cannot deny a certificate simply because it no longer approves of a basic reason for granting the T-3 certificate in 1967.

In our opinion there is nothing in the May 29, 1967, order or the other orders discussed above which prevents us from conditioning certificates necessary for the supply of new gas so that none of the offshore gas will be transported to the power plants of FPL. The expiration of a restrictive condition in the original certificate does not prevent us from imposing conditions in other certificates under changed circumstances.

We are aware that our order of September 15, 1965 (34 FPC at p. 854), states with regard to warranty sales

[3] *Florida Gas Transmission Company*, Docket No. CP65-393, 37 FPC 993 (1967).

that the "technique has a potential disadvantage in that existing as well as yet undiscovered fields may be attached to a pipeline and abandoned without regulatory action in future years." Whether or not this is still valid, applications were made here by Amoco and the pipelines for certificates for exchange arrangements, which involve more than mere attachments since the facilities of other pipelines are to be used.

Amoco argues that the May 2, 1977, condition with respect to the offshore gas is not supported by substantial evidence, and there is no evidence that the condition is required by the public convenience and necessity. We are confronted here with a pipeline system where more than one half of the deliveries are made under the transportation contracts to the power plants of Florida Power Corporation and FPL (Tr. 111, Ex. 7), and these deliveries have not been curtailed (Tr. 141). On the other hand deliveries by FGT to its resale interruptible customers under its I rate schedule have been substantially curtailed and, even more so, have deliveries to its Direct Preferred interruptible customers (Ex. 7) and these would be curtailed even after the proposed deliveries by Amoco. (Ex. 7A, 7B). The I resale customers include a large number of industrials, hotels, hospitals and governmental establishments as well as utilities. The direct customers include a number of industrials and municipal utility customers (Ex. 8).

At this time of gas shortage boiler fuel sales are, in general, considered by this Commission of lowest priority under our Order No. 467-B.[4] Although FGT does not have a 467-B type curtailment plan at this time, in Opinion No. 807, *Lehigh Portland Cement Company* v. *Florida Gas Transmission Company*, —— FPC ——, Docket No. RP75-79, issued June 24, 1977, FGT was required to file

[4] See Section 2.78 of the Commission's General Policy and Interpretations.

a curtailment plan in the light of the principles set forth in Order No. 467-B. In view of the place of the transportation gas in FGT's system as shown by the record, it is our opinion that Amoco and the other applicants have not shown that it is in the public convenience and necessity to grant the applications as proposed and permit any part of the new offshore gas to be transported and delivered to the power plants. With uncurtailed power plants receiving gas through transportation it is not in the public interest to permit any of the new gas going to the transportation service, even though FGT itself directly and for resale serves a power plant load.

Further, it is our opinion that our order is not unduly discriminatory in preventing offshore gas being transported to power plants, while not preventing FGT from selling gas for industrial and power plant use. In this certificate proceeding all we can require is that the offshore gas be delivered to FGT for use on its system rather than be transported to FPL's power plants. FGT has a curtailment plan at the present time, as detailed in *Lehigh*, by which firm resale service (Rate Schedule G) is given a higher priority than the resale and direct sale preferred interruptible service which serves industrials and some power plants. The appropriate priorities of service on the FGT system, including the transportation service, will be before us in the next phase of *Lehigh*.

Amoco asks that if the Commission refuses to modify its order, the Commission should provide that the certificated exchanges and services may be commenced without prejudice to the seeking of judicial review. We agree that this request is in the public interest and will so provide.

The Commission further finds:

The assignments of error and grounds for rehearing of the Commission's order of May 2, 1977, in the applications for rehearing filed by Amoco and FPL present no facts or legal principles that would warrant any change in or modification of the Commission's order as supplemented by the above discussion and as provided below.

The Commission orders:

(A) The applications for rehearing filed by Amoco and FPL are denied.

(B) Amoco and FPL are advised that the exchange and transportation of gas may be commenced as authorized in the order of May 2, 1977, without prejudice to their right to seek judicial review under Section 19 of the Natural Gas Act.

By the Commission.

[SEAL]

LOIS D. CASHELL,
Acting Secretary.

APPENDIX E

NATURAL GAS ACT

* * * *

Section 7(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f (b)]

Section 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days

after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

* * * *

Section 7(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issu-

ance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942), 15 U.S.C. § 717f(e)]

* * * *

Supreme Court, U.S.
FILED
DEC 4 1979
JR., CLERK

No. 79-508

In the Supreme Court of the United States

OCTOBER TERM, 1979

AMOCO PRODUCTION COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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INDEX

Page

Opinions below 1
Jurisdiction 2
Question presented 2
Statute involved 2
Statement 2
A. The 1965 certificate 2
B. The 1967 certificate 4
C. The 1977 certificate 5
D. The court of appeals decision 7
Argument 8
Conclusion 12

CITATIONS

Cases:

Arkansas Power & Light Co. v. *FPC*, 517 F. 2d 1223, cert. denied, 424 U.S. 933 10

California v. *Southland Royalty Co.*, 436 U.S. 519 11

City of Willcox v. *FPC*, 567 F. 2d 394 10

Civil Aeronautics Board v. *Delta Air Lines, Inc.*, 367 U.S. 316 8

Florida Gas Transmission Co., 37 F.P.C. 424 ..... 4, 5

Florida Gas Transmission Co., 37 F.P.C. 993 5

FPC v. *Louisiana Power & Light Co.*, 406 U.S. 621 4

Page

Cases (continued):

FPC v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 10

Mobil Oil Corp. v. *FPC*, 417 U.S. 283 11

Pan American Petroleum Corp., 34 F.P.C. 852 ..... 3, 11

Panhandle Eastern Pipe line Co. v. *Public Service Commission of Indiana*, 332 U.S. 507 4

Pennsylvania Gas & Water Co. v. *FPC*, 463 F. 2d 1242 11

State of Louisiana v. *FPC*, 503 F. 2d 844 10

Sunray Mid-Continent Oil Co. v. *FPC*, 364 U.S. 137 11

Tennessee Gas Pipeline Co v. *FPC*, 504 F. 2d 199 11

Texas Eastern Transmission Corp. v. *FPC*, 306 F. 2d 345, cert. denied, 375 U.S. 941 11

United Gas Pipe Line Co. v. *McCombs*, No. 78-17 (June 18, 1979) 11

United States v. *Seatrain Lines, Inc.*, 329 U.S. 424 ..... 7, 8

Page

Statutes and regulations:

Natural Gas Act, 15 U.S.C. 717 *et seq.*:

Section 1(b), 15 U.S.C. 717(b) 3, 4

Section 7, 15 U.S.C. 717f 2, 4, 5, 8, 10, 11, 12

Section 7(b), 15 U.S.C. 717f(b) 2, 7

Section 7(c), 15 U.S.C. 717f(c) 2

Section 7(e), 15 U.S.C. 717f(e) 2

18 C.F.R. Part 154 7

18 C.F.R. 154.1 *et seq.* 7

18 U.S.C. Part. 157 ..... 7, 11

18 C.F.R. 157.5 *et seq.* 10

18 C.F.R. 157.5-157.22 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 598 F. 2d 370. The orders of the Federal Power Commission[1] (Pet. App. 28a-43a, 44a-49a) are not reported.

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[1]Pursuant to the provisions of the Department of Energy Organization Act, 42 U.S.C. (Supp. I) 7101 *et seq.*, the Federal Power Commission ceased to exist on September 30, 1977, and most of its functions and regulatory responsibilities, including those relevant to this case, were assumed by the Federal Energy Regulatory Commission effective October 1, 1977. Hereinafter, the term "Commission" refers to the FPC or the FERC depending on whether the events occurred before or after October 1, 1977.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on July 5, 1979. The petition for a writ of certiorari was filed on September 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certificates of public convenience and necessity issued in 1965 and 1967 under Section 7 of the Natural Gas Act barred the Commission from imposing conditions in a 1977 certificate (a) to prevent use of the gas subject thereto for boiler fuel, and (b) to require Commission authorization before service under that certificate may be abandoned.

STATUTE INVOLVED

Sections 7(b), 7(c), and 7(e) of the Natural Gas Act, 15 U.S.C. 717f(b), 717f(c), and 717f(e), are set forth at Pet. App. 50a-52a.

STATEMENT

A. *The 1965 Certificate.*

Amoco Production Company ("Amoco") produces and sells natural gas from onshore and offshore fields (Pet. App. 12a). Pursuant to a warranty contract dated November 20, 1964, Amoco[2] and Austral Oil Company, Inc., agreed to sell 584.4 million Mcf of natural gas over a 20-year period to Florida Gas Transmission Company ("FGT") (Pet. App. 15a). In 1964, Amoco applied to the Commission for a certificate of public convenience and

[2]At that time and until 1970, the name of Amoco Production Company was Pan American Petroleum Corporation.

necessity authorizing the sale and delivery of this natural gas to FGT. *Pan American Petroleum Corp.*, 34 F.P.C. 852 (1965).[3]

The Amoco-FGT warranty contract differed from conventional natural gas sales contracts in that it did not dedicate specific acreage, fields, or reserves to its performance (Pet. App. 15a). The Commission granted the certificate in September 1965 (*ibid.*). It expressed concern, however, that this form of transaction might result in insufficient regulatory control over the dedication and abandonment of gas reserves. *Pan American Petroleum Corp.*, *supra*, 34 F.P.C. at 854.

To retain a measure of control over the sales proposed by the Amoco-FGT warranty contract, the Commission attached several conditions to the certificate. It required Amoco to inform the Commission of, and to report any changes in, the fields involved and the parties whose gas was being delivered to FGT. *Pan American Petroleum Corp.*, *supra*, 34 F.P.C. at 855. In addition, the order granting the certificate provided (*ibid.*):

> (C) The grant of the certificate issued in paragraph (A) above * * * is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Applicant. Further, our action in this proceeding shall not foreclose or prejudice any further proceedings or objections relating to the operation of any price or related provisions in the gas purchase contract herein involved.

[3]FGT's purchase constituted a sale in interstate commerce for resale, subject to the Commission's jurisdiction under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b).

Amoco accepted the certificate and, after the order became final, began deliveries under the contract (Pet. App. 17a).

B. *The 1967 Certificate.*

In March 1965, Amoco entered into a direct sales agreement with Florida Power & Light Company ("FP&L")[4] to supply gas for use as boiler fuel for a 20-year term (Pet. App. 29a). FGT separately agreed to transport this gas from Louisiana to FP&L's electric power generating facilities in Florida (*id.* at 13a). The Amoco-FP&L agreement was also a warranty contract that contained no dedication of specific leases or fields (*ibid.*). Because the Amoco-FP&L transaction was a direct sale to an end user and not a sale for resale, it was not subject to Commission jurisdiction.[5] However, FGT's interstate transportation of that gas required Commission authorization pursuant to Sections 1(b) and 7 of the Natural Gas Act, 15 U.S.C. 717(b) and 717f (*ibid.*).

FGT accordingly applied for a certificate of public convenience and necessity authorizing the transportation of the Amoco-FP&L contract gas and the construction and operation of facilities necessary to transport the gas. The Commission granted this certificate in March 1967. *Florida Gas Transmission Co.*, 37 F.P.C. 424 (1967). The certificate order provided that all gas transported to FP&L thereunder had to be produced entirely within the Southern Louisiana area, Mississippi, and other downstream states, and that no more than 85% of the gas produced in the Southern Louisiana area could be from

[4]Austral also agreed to sell gas to FP&L under the same contract.

[5]See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 637-638 (1972); *Panhandle Eastern Pipe Line Co.*, v. *Public Service Commission of Indiana*, 332 U.S. 507, 516-517 (1947).

offshore fields. 37 F.P.C. at 448. The Commission also ordered FGT to file annual reports identifying the total deliveries made to FP&L by Amoco and Austral under the warranty contract. *Id.* at 449.

In May 1967, the Commission approved a settlement that modified FGT's transportation certificate to provide that "from the date deliveries commence through ten years from such date the proportions of gas produced in the off-shore fields (Federal Domain) of Southern Louisiana shall not exceed 82 percent of the total amount of gas produced in the South Louisiana area." *Florida Gas Transmission Co.*, 37 F.P.C. 993, 994 (1967). The order also recited that it was without prejudice to any pending or future proceedings *Id.* at 995. This order became final in June 1967, and deliveries to FP&L commenced shortly thereafter (Pet. App. 14a).

C. *The 1977 Certificate.*

As part of its effort to find new sources of natural gas for delivery under its warranty contracts with FP&L and FGT, Amoco in 1972 and 1976 entered into exchange and transportation agreements with four interstate pipeline companies for the movement of gas from Amoco's offshore leases to delivery points on FGT's pipeline in Southern Louisiana (Pet. App. 8a-9a, 30a-33a). From these locations, FGT could transport the gas to Florida both for delivery to its own resale customers and for use by FP&L. Since these contractual arrangements required Commission authorization under Section 7 of the Natural Gas Act, Amoco and the four pipelines applied for certificates of public convenience and necessity (*ibid.*).[6]

[6]Several applications were filed (Pet. App. 8a-9a n.1):

(1) Amoco, in FPC Docket Nos. C177-80 and C177-81, for exchanges with Columbia and Natural;

After consolidating all of the applications relating to Amoco's exchange and transportation arrangements for offshore gas (Pet. App. 33a), the Commission on May 2, 1977, issued an order granting the certificate of public convenience and necessity subject to certain conditions (*id.* at 28a-43a).[7] Finding that "the granting of a certificate at this time to provide an additional gas supply for boiler use, in the absence of peculiar circumstances, would not be in the public interest" (*id.* at 36a), the Commission declined to authorize deliveries of gas to FP&L (*ibid.*). Accordingly, the Commission conditioned the certificate to provide "that the gas involved shall be delivered to FGT only in satisfaction of the Amoco-FGT warranty sale, and none of such gas shall be transported to [FP&L]" (*id.* at 42a-43a). In addition, the Commission's order provided that "[t]he certificate issued to Amoco in Ordering Paragraph (A) * * * [authorizing the exchange, transporation and facilities applied for] shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act or of Part 154 or Part 157 of the

(2) Columbia Gulf Transmission Company, in FPC Docket No. CP73-70, for transportation from onshore and offshore fields;

(3) Natural Gas Pipeline Company of America, in FPC Docket No. CP73-157, for transportation from an onshore field;

(4) Sea Robin Pipeline Company, in FPC Docket No. CP77-37, for transportation from an offshore field; and

(5) Columbia Gulf and Tennessee Gas Pipeline Company, in FPC Docket No. CP77-31, for transportation from an onshore field.

[7]The exchange and transportation agreements also involved onshore gas, and the Commission granted without condition the certificate of public convenience and necessity for that gas (Pet. App. 37a).

Commission's Regulations thereunder[8]* * *. The grant of the certificates aforesaid for service to the particular customer involved does not imply approval of all of the terms of the contract, particularly as to the cessation of the service upon termination of said contract as provided by Section 7(b) of the Natural Gas Act" (Pet. App. 41a). In an order issued July 27, 1977, the Commission denied applications for rehearing filed by Amoco and FP&L (*id.* at 45a-49a).

D. *The Court of Appeals' Decision.*

Upon review of the Commission's orders, the court of appeals affirmed (Pet. App. 1a-25a). The court held that "the Commission action was not an amendment or modification of the prior certificates; the Commission's prior actions did not otherwise prevent it from imposing restrictive conditions on the certificates; and the certificate conditions were within its lawful authority" (*id.* at 11a). In upholding the Commission's decision, the court distinguished *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), on the ground that "in this case, the Commission expressly refrained from reopening FGT's transportation certificate docket and limited itself instead to the then-pending applications" (Pet. App. 18a). The court observed that although the Commission's imposition of conditions on the certificates "undoubtedly affects the manner in which [petitioner] would thereafter be able to meet its obligations under the warranty contracts, the

[8]Part 154 of the Commission's Regulations, 18 C.F.R. 154.1 *et seq.*, sets forth filing requirements with respect to rates and charges for any transportation or sale subject to the Commission's jurisdiction. Subpart A of Part 157 of the Commission's Regulations, 18 C.F.R. 157.5-157.22, prescribes requirements for applications for Commission orders permitting abandonment of facilities or service pursuant to Section 7(b) of the Natural Gas Act.

conditions attached * * * only involved new sources of gas, and were based on the strain of the gas shortage and the public convenience and necessity * * *" (Pet. App. 19a). In addition, because the Commission had not amended the existing final certificates, the court rejected petitioner's contention that the Commission's action unlawfully modified the settlement agreement that the Commission had approved and incorporated in the 1967 certificate (*id.* at 11a). Finally, the court held that the Commission had reasonably based its certificate conditions upon a judicially-approved policy of conserving natural gas for essential uses in times of shortage (*id.* at 22a-25a).

ARGUMENT

1. Petitioner's principal contention (Pet. 10-16) is that the court of appeals' decision conflicts with the decision of this Court in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), that outstanding, final certificates may be modified only as authorized by statute. See also *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961). However, in this case, the Commission did not purport to alter an existing certificate (Pet. App. 36a-38a) and, after a thorough review of the record, the court of appeals expressly found that the Commission "did not by the action here amend or modify its prior certificates * * *" (*id.* at 7a). Thus, no question is presented here concerning the power of the Commission to modify outstanding certificates of public convenience and necessity issued under Section 7 of the Natural Gas Act, and the decision of the court of appeals does not conflict with the holding of *United States* v. *Seatrain Lines, Inc.*, *supra*.

Rather, the issue in this case is whether the certificates issued in 1965 and 1967 preclude the conditions imposed

by the Commission in the 1977 certificate. This narrow question was carefully explored by the court of appeals, which, in sustaining the Commission's findings (Pet. App. 38a, 46a-47a), correctly held that "the initial certificates cannot be read as tantamount to a decision on the public convenience and necessity of every subsequent purchase or transportation that might in the future be desired by [petitioner] to comply with the [previously certificated warranty] contracts" (Pet. App. 17a). As the court concluded (*id.* at 19a), the Commission in 1965 and 1967 "did not, and could not, cast off its statutory obligation to judge future applications in light of the public interest at the time of consideration." Indeed, the Commission included in both the 1965 and 1967 certificates an explicit disclaimer of any intention to bind itself in future proceedings (see pages 3, 4, *supra*).[9]

Moreover, the Commission in its 1977 certificate did not "renege" (Pet. App. 20a) on its earlier authorizations. The conditions attached to the 1977 certificate "only involved new sources of gas" (*id.* at 19a) and did not apply to gas sold or transported under the 1965 and 1967 authorizations. In addition, as the court of appeals determined (*id.* at 20a-21a), these conditions were not inconsistent with the prior certificates and did not frustrate petitioner's ability to perform the warranty contracts:

> There is nothing to indicate that [petitioner] will not be able to meet its contract commitments. If it were otherwise, we would address the question anew. But there is no evidence on this record that [petitioner] will be unable to discover and produce gas from

[9]The Commission itself explained (Pet. App. 37a) that its grant of "a certificate to [petitioner] to sell gas to FGT and a certificate to FGT to transport and sell this gas and other gas [petitioner] would sell to [FP&L] did not mean that the Commission undertook to

onshore fields to satisfy its obligations under the contracts. If [petitioner] cannot timely discover and commence production from new onshore fields, it will be forced to purchase gas to meet the warranty obligation to FP&L, probably at a higher cost. Cost alone, however, cannot be a determining factor in a review of the Commission's policy determinations during a natural gas shortage. We do not say that a producer in [petitioner's] situation could never prevail upon this argument. [Petitioner] cannot prevail on this record.

When petitioner sought a certificate for new exchange and transportation arrangements to carry out its warranty contracts with FGT and FP&L, the Commission was required under Section 7 to act in light of the current public interest. Because of acute shortages of natural gas for the interstate market in 1977, the Commission properly concluded that use by FP&L of the offshore gas for boiler fuel was inconsistent with that interest.[10]

---

grant all certificates necessary for [petitioner] to carry out its warranty obligations regardless of whether they might not be otherwise in the public interest."

[10]The Commission's decision not to certificate deliveries of gas to FP&L was based on its policy of assigning a low piority to the use of gas as boiler fuel in generating electricity. This policy had previously been approved by this Court. See *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961). See also *City of Willcox* v. *FPC*, 567 F. 2d 394, 405-408 (D.C. Cir. 1977); *Arkansas Power & Light Co.* v. *FPC*, 517 F. 2d 1223, 1228-1229 (D.C. Cir. 1975), cert. denied, 424 U.S. 933 (1976); *State of Louisiana* v. *FPC*, 503 F. 2d 844, 858-860 (5th Cir. 1974).

Petitioner now suggests (Pet. 13 n.5) that federal policy regarding the use of natural gas as boiler fuel may have changed since the Commission issued the orders under review. As a certificate holder, petitioner can apply to the Commission for amendment of its certificate under Section 7 and 18 C.F.R. 157.5 *et seq.*. In this way, petitioner may seek to have modified the order it challenges here.

Nothing in its prior actions required the Commission in 1977 to issue certificates for such use contrary to its statutory responsibilities.[11]

2. Petitioner claims (Pet. 16-18) that the Commission has improperly overriden the previously approved 1967 settlement. See, *e.g.*, *Tennessee Gas Pipeline Co.* v. *FPC*, 504 F. 2d 199 (D.C. Cir. 1974); *Texas Eastern Transmission Corp.* v. *FPC*, 306 F. 2d 345 (5th Cir. 1962), cert. denied, 375 U.S. 941 (1963). However, this contention overlooks the principle that what controls is the Commission's approval of the settlement as embodied in the authorized certificate, not the settling parties' assumptions. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 313-314 (1974); *Pennsylvania Gas & Water Co.* v. *FPC*, 463 F. 2d 1242, 1246 (D.C. Cir. 1972). For the reasons discussed above, the 1977 certificate did not modify the 1967 certificate. Furthermore, when the Commission approved the 1967 settlement, it did not purport to

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[11]We also note that the condition in Paragraph (D) of the 1977 order (Pet. App. 41a) simply reiterated the well-established principle that Commission authorization is required for cessation of interstate service under a Section 7 certificate. See, *e.g.*, *United Gas Pipe Line Co.* v. *McCombs*, No. 78-17 (June 18, 1979); *California* v. *Southland Royalty Co.*, 436 U.S. 519 (1978); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960). Neither of the previously issued certificates purported to contain a waiver of the Section 7 abandonment requirement or an advance grant of abandonment authorization. On the contrary, the 1965 certificate expressly stated that its action was not a waiver of the Commission's abandonment regulations (18 C.F.R. Part 157). See *Pan American Petroleum Corp.*, *supra*, 34 F.P.C. at 855. Thus, the 1977 certificate imposed no new conditions in this regard. Moreover, the Commission recognized that approval of the warranty contracts might undermine regulatory control over abandonment. Accordingly, the 1965 and 1967 orders required petitioner to identify and to report to the Commission any changes in the fields and parties serving as supply sources. See page 3, *supra*. This requirement was a plain warning that petitioner could not justifiably rely upon the prior certificates as a kind of advance Commission approval of any interstate service it might decide to initiate or terminate.

relinquish its statutory duty to assess future applications under Section 7 of the Act. Instead, it expressly reserved that authority (see pages 3, 4, *supra*). Thus, the 1977 certificate is fully consistent with the general rule that settlements accepted by the Commission are binding upon it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 79-508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

AMOCO PRODUCTION COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
ARGUMENT	1
I. The *Seatrain* Doctrine	1
II. The Settlement Agreement	7
III. The Section 7(b) Condition	10
IV. Finality of Certificates	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

American Smelting & Refining Company v. *Federal Power Commission*, 494 F.2d 925 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 882 (1974) 6
Arkansas Power & Light Company v. *Federal Power Commission*, 517 F.2d 1223 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976) 6
City of Willcox v. *Federal Power Commission*, 567 F.2d 394 (D.C. Cir. 1977) 6
Civil Aeronautics Board v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961) 5
Continental Oil Company v. *Federal Power Commission*, 373 F.2d 96 (10th Cir. 1967) 7, 9
Federal Power Commission v. *Moss*, 424 U.S. 494 (1976) 11
Federal Power Commission v. *Texaco Inc.*, 417 U.S. 380 (1974) 5
Federal Power Commission v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1961).. 6
Pacific Gas & Electric Company v. *Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974) 6
Shell Oil Company v. *Federal Energy Regulatory Commission*, 566 F.2d 536 (5th Cir. 1978) 6
Sunray Mid-Continent Oil Company v. *Federal Power Commission*, 364 U.S. 137 (1960) 11
Sunray Mid-Continent Oil Company v. *Federal Power Commission*, 239 F.2d 97 (10th Cir. 1956), *rev'd on other grounds*, 353 U.S. 944 (1957) 11
Tennessee Gas Pipeline Company v. *Federal Power Commission*, 504 F.2d 199 (D.C. Cir. 1974) 7
Texas Eastern Transmission Corporation v. *Federal Power Commission*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963) 5, 7, 9, 15
United States v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947) 1, 2, 3, 4, 5, 7 15

TABLE OF AUTHORITIES—Continued

ADMINISTRATIVE DECISIONS: Page

Alabama-Tennessee Natural Gas Co., et al., 14 F.P.C. 986 (1955) 5
Anthony J. Tamborello, et al., 14 F.P.C. 123 (1955), *rehearing denied*, 15 F.P.C. 1 (1956).... 5
Continental Oil Company, et al., 28 F.P.C. 1090 (1962) 10
H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al., 34 F.P.C. 897 (1965) 5

STATUTES AND REGULATIONS:

Natural Gas Act, 52 Stat. 821 (1938), 15 U.S.C. § 717 *et seq.*:

Section 1(b), 15 U.S.C. § 717(b) 10
Section 4 15 U.S.C. § 717c 12, 13
Section 7, 15 U.S.C. § 717f 3, 5, 11
Section 7(b), 15 U.S.C. § 717f(b) ...10, 11, 12, 13, 14

Applications for Certificates of Public Necessity and Convenience and for Order Permitting and Approving Abandonment Under Section 7 of the Natural Gas Act, 18 C.F.R. Part 157 *et seq.* ..12, 13, 14
Rate Schedules and Tariffs, 18 C.F.R. Part 154 *et seq.* 12, 13

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REPLY BRIEF FOR PETITIONER

Petitioner Amoco Production Company (Amoco) hereby replies to the "Brief for the Federal Energy Regulatory Commission In Opposition" filed on or about December 4, 1979.

ARGUMENT

I. *The Seatrain Doctrine.* The Commission first argues that *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), is not applicable (FERC Br., p. 12). The argument is specious and not in accord with reality.

1. The Court of Appeals recognized that ". . . imposition of conditions on Amoco's applications for additional certificates undoubtedly affects the manner in which Amoco would thereafter be able to meet its warranty

contracts . . . ." (Pet. 19a). That is precisely the case. The 1977 conditions directly prohibit performance and acts expressly authorized by the 1967 certificate and thus have the effect, in fact and in law, of altering and modifying the final 1967 certificate.

The "technical" point that this result was accomplished in a new docket rather than by reopening the original docket (Pet. 7a) has no bearing whatever upon the legal and factual result and impact. It is merely an argument that the Commission can do by indirection in a new docket that which it cannot do directly in the original docket.

The 1967 certificate, as amended on May 29, 1967, expressly authorized up to 82% of the total deliveries to Florida Power and Light Company (FP&L) to come from offshore sources, balanced over ten years, with *no* restriction as to source thereafter (R. 1202). The 1977 conditions bar *all* offshore sources for deliveries to FP&L where transportation to onshore locations must be authorized by the Commission. (Pet. 42a-43a). What is authorized and permissible one day becomes prohibited the next, and this is the reality of what is involved in this case.

The focus in *Seatrain* was directly upon such impact, not upon "technical" procedural defenses asserted by the ICC. There, as here, alteration and modification of performance authorized by a final certificate was prohibited. The "technical" procedural distinction asserted by the Commission thus is without merit, and the holding in *Seatrain* clearly applies.

2. Next, the Commission argues that the 1965 and 1967 certificate orders did not preclude the conditions imposed in 1977 (FERC Br., pp. 8-9). This is not correct, and the principle of administrative finality is fully applicable to the 1965 and 1967 certificates.

Those certificate orders contain all necessary findings under Section 7 of the Natural Gas Act as to the public convenience and necessity requiring, during the full term thereof, Amoco's sale to FGT and FGT's transportation of volumes sold by Amoco to FP&L. The certificates authorized the sale of the defined, fixed total quantity of 584,400,000 Mcf covered by the contract between Amoco and FGT (R. 433-436, 672), and the transportation by FGT of the defined, quantity to be sold by Amoco under its contract with FP&L (R. 415-416, 533-535, 540, 1148).

Findings and conclusions as to delivery of those total quantities were made under the Section 7 standard in 1965 and 1967, and sources for those total quantities were then authorized. The Commission recognizes that these orders became final (FERC Br., pp. 4, 5). Thereafter, the quantities and sources there authorized were not subject to the alterations and modifications attempted by the 1977 order without violation of the principle of finality and the *Seatrain* doctrine.

However, the Commission now erroneously states that the 1977 certificate "only involved new sources of gas" and "did not apply to gas sold or transported under the 1965 and 1967 authorizations" (FERC Br., p. 9). This simply is not so. The quantities involved are *portions* of the volumes sold and transported precisely as authorized under the 1965 and 1967 certificates. The 1977 proceeding did *not* involve new, additional quantities to be sold to FP&L; new, additional quantities to be transported by FGT; or new, additional demands for FP&L. All volumes are to be sold and transported under the unmodified contracts as approved by the Commission in 1965 and 1967.

All required findings under Section 7 as to those volumes and permissible sources of gas were made in the 1965 and 1967 certificates. Therefore, no matter how the

record is examined, the 1977 conditions are "inconsistent with the prior certificates" (Cf. FERC Br., p. 9) and have the legal and practical effect of barring performance authorized in 1967 and of unlawfully altering and modifying Amoco's rights under the prior certificate.

3. The Commission argues that this result is not precluded by the 1967 certificate (FERC Br., p. 9), but the argument has no valid basis.

Even if the Commission could review the additional transportation under the 1977 certificates, it could not ignore its prior findings and conclusions in final orders permitting the sale and transportation of gas to FP&L and expressly authorizing the use of offshore gas. The 1977 review necessarily had to be made in light of finality of the 1967 certificate and the impact of attempting to rewrite that certificate and change Amoco's rights thereunder. The limited additional transportation involved could be reviewed only in that context, and the Commission cannot make an end-run around finality and the *Seatrain* doctrine by arguing that it was free to ignore the legal effect of the 1967 certificate and the effect of the new conditions in altering and modifying the permitted performance of the 1967 certificate.

The Commission was not free, as it argues, to ignore the 1967 certificate and act as though it had no binding effect in the 1977 proceedings.

4. The Commission also argues that "boilerplate" language in its certificate orders, concerning no "prejudice" in future or pending proceedings, were a "reservation" of a right to modify the 1967 certificate or to disregard its finality and binding effect in 1977 (FERC Br., pp. 3, 4, 9).

This argument is flatly contradicted by Commission and judicial construction of such "boilerplate" language and clauses and is a *post-hoc* rationalization of counsel

not appearing in the orders on review and not a proper basis for upholding Commission orders. See *Federal Power Commission* v. *Texaco Inc.*, 417 U.S. 380 (1974), and cases cited, 417 U.S. at 397.

In any event, the Commission has unilaterally and automatically inserted "boilerplate" language in Section 7 certificate orders for decades. See, *e.g.*, *Alabama-Tennessee Natural Gas Co., et al.*, 14 FPC 986, 999 (1955); *H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al.*, 34 FPC 897, 908 (1965). In one of the earliest producer proceedings before it, the Commission itself stated that it intended such language *only* to be " . . . a standard reservation of the Commission's unquestioned right under the Act, upon its own motion or upon proper complaint, *to inquire later into the reasonableness of rates* proposed to be charged by the producers." *Anthony J. Tamborello, et al.*, 14 FPC 123, 126 (1955), *reh. denied*, 15 FPC 1 (1956) (emphasis supplied).

As to judicial construction, such boilerplate language was included in the order reviewed in *Texas Eastern Transmission Corporation* v. *Federal Power Commission*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963). Nonetheless, the court held an order approving a settlement to be binding and controlling on the Commission despite such language.

The argument in the Commission brief is thus refuted by Commission and judicial construction of such clauses. If they had the meaning now claimed, no certificate issued under Section 7 of the Act would ever have finality or binding, controlling effect.[1] *Seatrain* and the principle of

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[1] In *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961), prior to issuing the certificate, the Board purported to reserve "jurisdiction" to make later modifications in the certificate. This Court held that it did not ". . . make any difference that the Board has purported to reserve jurisdiction prior to certification

finality of agency action would then be erased from the law.

5. As to the argument that the Commission's policy as to boiler fuel in the 1970's is a full justification for Commission action (FERC Br., p. 10), what the Commission has done is to apply that policy incorrectly and retroactively to a transaction finally approved in 1967 *after* consideration of boiler fuel use. The Commission then fully canvassed air pollution problems in Florida, benefits of the transaction to FGT's system, and benefits to FGT's customers and other Florida interests (R. 1168-1169).

The policy announced in the 1970's cannot be applied without consideration of evidence and without supporting reasons in specific cases. *Pacific Gas & Electric Company* v. *Federal Power Commission*, 506 F.2d 33, 38-39 (D.C. Cir. 1974). The policy is not treated as conclusive, is but one factor to be considered in a balancing process, and is not applied without regard for evidence of particular circumstances. *American Smelting & Refining Company* v. *Federal Power Commission*, 494 F.2d 925, 944-946 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974). There is and can be no "flat rule" against boiler fuel use, and end use is but one factor to be considered under Section 7. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1961). The "inferiority" of boiler fuel use depends upon record evidence and the particular circumstances. *City of Willcox* v. *Federal Power Commission*, 567 F.2d 394 (D.C. Cir. 1977); *Arkansas Power & Light Company* v. *Federal Power*

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to make summary modifications . . . ." (367 U.S. at 321). Despite the purported reservation, the Board, as a creature of Congress, was held bound by the statute (367 U.S. at 322). See also *Shell Oil Company* v. *Federal Energy Regulatory Commission*, 566 F.2d 536 (5th Cir. 1978).

Commission, 517 F.2d 1223 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).[2]

Therefore, in this case, the general "policy" cannot lawfully supersede findings made in 1967 or override the controlling considerations of finality of that certificate or support unlawful attempts to modify its terms and deprive Amoco of its rights under that certificate.

6. In sum, no matter how the Commission's arguments are cast, the Commission cannot change the reality that the Commission has, in fact and legal and practical effect, altered and modified Amoco's rights under a final certificate. The decision below therefore plainly is in conflict with *Seatrain*, and that conflict should be reviewed by this Court.

II. *The Settlement Agreement.* The Commission further contends that the Fifth Circuit's decision is not in conflict with prior decisions as to the binding, controlling effect on the Commission of settlements approved by the Commission (FERC Br., p. 11).[3] The Commission's statements do not support the contention and are *directly* refuted by the contents of the 1967 Commission orders.

1. The Commission makes the strange statement that ". . . what controls is the Commission's approval of the

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[2] The Commission says that in view of changes in federal policy, Amoco as ". . . a certificate holder . . . ." can petition to have the conditions removed (FERC Br., p. 10 n.10). However, the transporting pipelines, not Amoco, are the certificate holders, and if the Commission took as long to act on such a petition as it did on the applications here involved, the issues would be moot before a decision would be made.

[3] As shown in the Petition (pp. 16-18), the Fifth Circuit decision is in conflict with *Texas Eastern Transmission Corporation* v. *Federal Power Commission*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963); *Continental Oil Company* v. *Federal Power Commission*, 373 F.2d 96 (10th Cir. 1967); *Tennessee Gas Pipeline Company* v. *Federal Power Commission*, 504 F.2d 199 (D.C. Cir. 1974).

settlement as embodied in the authorized certificate, not the settling parties' assumptions" (FERC Br., p. 11). Here, the approval *is* embodied in the certificate, and the substantive terms were *expressly* incorporated into the certificate by Commission order amending the certificate. Nothing could be plainer when the 1967 orders are read, and no "assumptions" are involved.

The certificate issued on March 1, 1967 contained the express condition limiting sources for deliveries to FP&L to no more than 85% from fields offshore Louisiana (R. 1171). Thereafter, in its order issued May 29, 1967 approving the settlement, the Commission made findings as to the substantive terms of the settlement, approved those terms, and *expressly* amended the certificate to provide ". . . that from the date deliveries commence through ten years from such date the proportions of the gas produced in the offshore fields (Federal Domain) of Southern Louisiana shall not exceed 82% of the total amount of gas produced in the South Louisiana area" (R. 1202). This last order thus not only embodied approval, but modification by the Commission of the certificate order to include substantive terms of the settlement.

Since the Commission agrees ". . . that what controls is the Commission's approval as embodied in the authorized certificate . . . ." (FERC Br., p. 11), upon reading the two 1967 orders, it must concede that the approval by the Commission was, in fact, expressly embodied in the May 29, 1967 order; that this case thus is *within* the rule that an approved settlement is binding and controlling on the Commission; and that the decision below is in conflict with decisions of the Fifth, Tenth, and District of Columbia Circuits.[4]

2. The Commission argues that the 1977 certificate did not modify the 1967 certificate (FERC Br., p. 11).

[4] See cases cited in fn. 3, *infra*.

As shown above, this simply is not so, particularly when the legal and practical effect and impact on Amoco's rights under the 1967 certificate are considered.

Simply put, one day Amoco is authorized to connect offshore sources to deliver to FP&L within the percentage limitation set out in the May 29, 1967 order amending the certificate; the next day, because of the 1977 order, Amoco is prohibited from connecting *any* offshore sources for deliveries to FP&L requiring transportation authorization.

This is a modification and alteration of the approved settlement and the May 29, 1967 order under any definition of those terms in the English language. It also is precisely the type of collateral, evasive change of an approved settlement condemned by the courts in holding the Commission bound by terms of a settlement previously approved by it.

3. The Commission also suggests language in the 1967 order purported to reserve "authority" as to future applications (FERC Br., pp. 11-12). As shown above, the "boilerplate" language relied upon by the Commission does *not* have the legal effect of such a blanket "reservation" to modify the terms of a final, approved settlement. Moreover, similar contentions by the Commission as to such "boilerplate" have been rejected in cases holding the Commission bound by an approved settlement.

In *Texas Eastern Transmission Corporation* v. *Federal Power Commission*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963), the settlement order contained language that it was "without prejudice" to future findings and orders in another docket, but the court held such language did not permit amendment or modification of the approved settlement by orders entered in that docket (306 F.2d at 354-358). Similarly, in *Continental Oil Company* v. *Federal Power Commission*, 373 F.2d 96

(10th Cir. 1976), the Commission relied upon its "boiler-plate" in a temporary certificate, but the court held that the language ". . . is simply 'boiler-plate' intended to prevent a certificate holder *from filing for a change of rate* during the life of a temporary certificate" (373 F.2d at 100, emphasis supplied). (See also *Continental Oil Company, et al.*, 28 FPC 1090, 1094 (1962), as to "boiler-plate" in the order approving the settlement). The courts thus hold that language such as that now relied upon by the Commission does not remove finality or permit subsequent modification by the Commission of an approved settlement.

4. Contrary to the Commission (FERC Br., p. 12), the 1977 order thus violates the "general rule" that settlements accepted by the Commission are binding upon it. The decision below presents a direct conflict with the holdings of the Fifth, Tenth, and District of Columbia Circuits and should be reviewed by this Court.

III. *The Section 7(b) Condition.* The unlawful condition in Ordering Paragraph (D) of the 1977 certificate order, requiring future "abandonment" authorizations under Section 7(b) of the Natural Gas Act, is defended by the Commission (FERC Br., p. 11 n. 11), but the effort is a failure.

1. To the extent that this condition may be intended to apply in *any* way to sources of deliveries to FP&L, the condition is patently unlawful. Amoco's sale to FP&L is not a "sale for resale," but is a direct sale not subject to Commission jurisdiction under the Act (Section 1(b), 15 U.S.C. § 717(b)). Section 7(b) of the Act thus has *no* applicability whatsoever to Amoco's sale to FP&L.

2. The content, terms, and conditions of the 1965 order granting Amoco a certificate to sell to FGT (R. 1128-1133) show that the provisions of Section 7(b) are not applicable to sources for deliveries to FGT.

The certificate authorized the sale only of the fixed, finite quantity of 584,400,000 Mcf, nothing less and nothing more (R. 1128). In its order, the Commission discussed the nature of such "warranty contracts," stating ". . . that existing as well as yet undiscovered fields may be attached to a pipeline *and abandoned without regulatory action in future years*" (R. 1130, emphasis supplied). The certificate authorized the sale in accordance with the quantity and terms of the contract.

In light of this recognized inapplicability of Section 7(b) as to "abandonments" in future years, the Commission imposed the condition only requiring Amoco to file statements ". . . at such time as there is a *cessation of deliveries* of gas from any particular field notifying the Commission of the identity of the producers involved and the occurrence of *cessation of deliveries.*" (R. 1133, emphasis supplied). The Commission thus recognized that the certificate is finite in terms of the fixed quantity and that future disconnections of fields, during and at completion of delivery of that 584,400,000 Mcf finite quantity, would *not* be subject to the requirements of Section 7(b) of the Act.

The Commission is authorized to issue such limited-term certificates under the Act. *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 239 F.2d 97 (10th Cir. 1956), *rev'd on other grounds*, 353 U.S. 944 (1957); *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137 (1960). The Commission also may permit "pregranted" abandonment as to future cessation of sales. *Federal Power Commission* v. *Moss*, 424 U.S. 494 (1976).

Under these interpretations of Section 7 of the Act, the Commission has issued limited certificates, as it did in the 1965 order, to which future procedures under Section 7(b) of the Act are not applicable. The Amoco 1965 certificate, authorizing a sale of a fixed quantity of gas

without commitment or dedication of specific properties, thus differs from certificates unlimited as to quantity or duration issued for conventional gas sales contracts committing and dedicating specific properties. Only such conventional contracts and such unlimited certificates were involved in the three cases cited by the Commission (FERC Br., p. 11 n. 11), and application of Section 7(b) in those cases has no revelance at all to the Amoco 1965 certificate or the issues in this case.

3. Despite the plain language in the 1965 order, the Commission argues that Commission reference to Part 157 of the Regulations in one ordering paragraph in that order meant that Section 7(b) requirements as to deliveries were deemed applicable in the future to the sale (FERC Br., p. 11 n.11).[5]

Part 157 of the Regulations contains extensive, lengthy regulations covering all or part of thirty-seven pages of fine print in the Code of Federal Regulations (18 CFR §§ 157.5, *et seq.*). The subjects covered include applications for certificates and abandonment by pipeline companies, abbreviated applications, applications covering acquisitions, applications for temporary certificates, applications for certificates by independent producers and gatherers, applications for amendments of certificates, applications for abandonment, exemptions from certificate requirements, and other subjects.

An obscure reference to such a grab-bag of regulations could hardly be notice or a holding that Section 7(b) requirements applied in the future, despite the language to the contrary in the Commission's order. Indeed, some parts of Part 157 would apply, such as provisions applicable to a future application to amend the certificate,

[5] The order also provided for future applicability of Section 4 and Part 154 of the Regulations (R. 1132). These apply to future increases in rates.

but others clearly do not. Among those which do *not* are the sections relating to applications for abandonment.

Significantly, the language relied on by the Commission contains an express reference to Section 4, concerning future rate increases, but *no* reference whatever to Section 7(b) (R. 1132). The pertinent provision states:

> "(C) The grant of the certificate issued in paragraph (A) above shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas *lar customres involved imply approval of all of the*
>
> Nos. CI65-37, CI65-95, CI65-101, CI65-101, CI65-374, CI65-661, CI65-726, CI65-847, CI65-956, CI65-1145, CI65-1314, and CI65-122.
>
> Act or of Part 154 or Part 157 of the Commission's Regulations thereunder * * *" (R. 1132).

The omission of reference to Section 7(b) is in *direct* contrast to the language in ordering paragraphs of orders issuing certificates for conventional sales which contain an *express* reference to Section 7(b). The *differing* language used in certificates for conventional sales by producers reads:

> "(C) The grant of the certificates issued in paragraph (A) above shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act or of Part 154 or Part 157 of the Commission's regulations thereunder, * * * *Nor shall the grant of the certificates aforesaid for service to the particular customers involved imply approval of all of the terms of the respective contracts, particularly as to cessation of service upon termination of said contracts, as provided by Section 7(b) of the Natural Gas Act* * * *" (Emphasis supplied).[6]

[6] This express reference to Section 7(b) thus appears in the order issued October 27, 1964 in Docket Nos. G-2810, *et al.*, issuing a certificate to Amoco for a conventional sale in Docket No. CI65-122. The same express reference to Section 7(b) appears in the language uniformly used in orders issuing certificates for conventional sales. See as examples orders issuing certificates to Amoco in Docket Nos. CI65-37, CI65-95, CI65-101, CI65-122, CI65-374, CI65-661, CI65-726, CI65-847, CI65-956, CI65-1145 and CI65-1314.

The first sentence in ordering paragraph (C) in these orders applicable to conventional sales thus is identical to the first sentence in ordering paragraph (C) in the 1965 order issuing Amoco's certificate. However, the additional sentence in orders applicable to conventional sales, underscored above, contains the *express* reference to Section 7(b) which does *not* appear in the 1965 order granting Amoco's certificate (R. 1132). Had the Commission so intended Section 7(b) to apply in the future to Amoco's sale to FGT, it thus would have said so, as it does in orders applicable to conventional sales.

The general reference to all of Part 157, in light of the order as a whole, therefore does *not* have the meaning now asserted by the Commission. The controlling ordering Paragraph (A) issued a certificate ". . . *as described above* and as more fully described in the application, supplements, and exhibits in this proceeding" (R. 1131, emphasis supplied).

4. The 1965 certificate order covering Amoco's sale to FGT thus authorized cessation of deliveries from specific fields without an application under Section 7(b). The 1977 certificate order now on review purports to modify that authorization. The 1977 certificate order thus violates the principle of finality and conflicts with the *Seatrain* holding, and this issue also should be reviewed by this Court.

IV. *Finality of Certificates.* Throughout, the Commission's brief studiedly ignores the actual impact of the new 1977 certificate conditions upon Amoco's performance as authorized by the 1967 certificate and Amoco's rights thereunder to sell and deliver from offshore sources to FP&L. Reality and practical adverse impact on performance are swept aside, and the arguments presented are inconsistent with the record and in direct conflict with the content of the Commission orders involved.

However, as Amoco shows in the Petition (pp. 14-16, 17-18), the principles of finality of certificates, of adherence to the *Seatrain* holding, and of binding effect of approved settlements are of utmost importance to all operations and planning of all companies regulated under the Natural Gas Act. As stated in *Texas Eastern Transmission Corporation* v. *Federal Power Commission*, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963), a settlement agreement ". . . should stand for what it says" (306 F. 2d at 348); and, as stated in *Seatrain*:

> "The certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole *or in part* except as specifically authorized by Congress." (329 U.S. at 432-433, emphasis supplied).

Amoco urges that the questions presented be reviewed in light of the actual content of the Commission orders and the substantive impact of the Commission's actions and not in terms of the strained, erroneous arguments submitted on behalf of the Commission.

CONCLUSION

For the reasons stated in this Reply Brief and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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